Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

WILLIAM ALLEN ARNOLD,
Defendant-Appellant-Petitioner

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

Subject Matter Jurisdiction

1. What does *defraud* mean?

2. Does 18 U.S.C. § 371 (*defraud*) alter that definition?

3. By what procedure is a crime defined?

   (Has the "Klein conspiracy" *ever* been a crime?)

Plea Agreements

4. Can an instantly self-breaching plea agreement support a judgment?

Evidence, Sentencing

5. Are ex parte presentations of purported "damages," offered for the first time at sentencing, *testimonial statements*?

6. Based on what evidence is the threshold "maximum sentence" determined, by which a subsequent upward (or downward) departure is then taken?

Double Taxation, Simultaneous Double Jeopardy

7. Can either judgment stand where they create "simultaneous double jeopardy?"

Parties

The court of appeals judgment(s) sought to be reviewed is (are) from the direct appeal(s) to the Eleventh Circuit, and the parties to the appellate proceeding are as follows:

Case No. 03-12810-DD

UNITED STATES OF AMERICA

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Table of Contents

Questions Presented For Review i

Parties ii

Table of Cited Authorities vii

Citations to decisions below x

Jurisdiction x

Non-Argument Calendar Preferred x

Key Statutory and Charging Instrument Language xi

Title 18 xi
Section 371. Conspiracy to commit offense or to defraud United States xi

Internal Revenue Code xi
Section 7201. Attempt to evade or defeat tax xi
Section 7212(a). Attempts to interfere with administration of internal revenue laws xii

The so-called "Klein conspiracy" language xii
The "Klein conspiracy" language of Count One xii
The "Larceny by Trick" Component xiii
The Added Mens Rea Component xiii
The "Larceny by Trick" Component—Sources xiii
The Added Mens Rea Component—Sources xiii

Citations to additional authority xiv

Statement of the Case 1

Trial Court Jurisdiction 1

TraffiCenter—The "Traffic Report" Ad Business 1
Lawful line of commerce. 1

Lawful structure—politically incorrect. 1
Lawful activities—politically incorrect. 1
Non-reporting issue 1

The Confused Indictment 1
Whose "gross income?" 1
Which parties? In what capacity? For what amount? 2

Fleming's Overtly Self-breaching Plea "Agreement" ... 2
No crime charged. 3
No "property of the United States." 3
Sentenced on SIX DISMISSED counts! 3

Arnold's Trial 3
The jury instruction—*defraud*. 3
Sentenced on DISMISSED counts! 3
Sentenced on matters *not even charged!* 3

Punitive Double Taxation 3

Simultaneous Double Jeopardy 4

Argument 5

Remedies Requested 5
Release Pending Appeal. 5
Reversal of Judgment 5

Summary 5
Even Klein didn't commit a "Klein conspiracy!" 5

Perspective 5
"Drug"-case and "Tax"-case prosecutors. 5

No Subject Matter Jurisdiction 6

1. What does *defraud* mean? 6
The appellate opinion epitomizes the problem. 6

Common-law canon. 7
Defraud—By the elements. 7
Conclusion. 7

2. Does 18 U.S.C. § 371 (*defraud*) alter that definition? .. 8
Narrowing Element (2). 8
The 11th Circuit applies the common-law canon ... 8
... except in the "income tax" context. 8
The infamous sentence from *Haas*. 8
The *Hammerschmidt* context—no *financial* loss. .. 9
Recognition of § 371's scope. 10
No conspiracy exists without a substantive offense. 12
Section 371 (*defraud*) requires objective of *defrauding*. 13
Generic Conspiracy Elements Define Nothing. 13
"Conspiracy to Defraud" Elements. 13
The Legal Theories in Proper Application. 13
Conclusion. 14

3. By what procedure is a crime defined? 15
Standard of Review. 15
Has the "Klein conspiracy" *ever* been a crime? 15
"Klein conspiracy" language is non-statutory. 15
Due Process "Principle of Legality" is violated. 16
Separation of Powers is violated. 16
Conclusion. 18

No Plea Agreement 19

4. Can an instantly self-breaching plea agreement support a judgment? 19
No crime charged. 19
No "property of the United States." 19
Sentenced on SIX DISMISSED counts! 19
Conclusion. 20

No Evidence; Ramshackle Sentencing 20

5. Are ex parte presentations of purported "damages," offered for the first time at sentencing, *testimonial statements*? 20

6. Based on what evidence is the threshold "maximum sentence" determined, by which a subsequent upward (or downward) departure is then taken? 20

What is a *testimonial statement*? 20
The "maximum sentence" looks to what evidence? 21

Conclusion—Questions 5 and 6. 21

Double Taxation, Simultaneous Double Jeopardy 22

7. Can either judgment stand where they create "simultaneous double jeopardy?" 22
The Entity Plaintiff Created. 22
The "Ownership" Plaintiff Created. 22
Simultaneous Double Jeopardy. 22
Multiple punishments prohibited. 23
Named entities. 23
Entities not named. 23
Attachment. 23
Plaintiff is hoisted by its own petard! 25
Conclusion. 25

Conclusion 26

Remedies Requested 28

Table of Cited Authorities

Cases

Bell v. United States, 462 U.S. 356 (1983). 7
Blakely v. Washington, 542 U.S. —, 124 S. Ct. 2531 (2004). 21
Bouie v. City of Columbia, 378 U.S. 347 (1964). 16
Carter v. United States, 530 U.S. 255 (2000). 7
City of Chicago v. Morales, 527 U.S. 41 (1999). 16
Crawford v. Washington, 541 U.S. 36 (2004). 20
Dennis v. United States, 341 U.S. 494 (1951) (Frankfurter, J., concurring) ("*Dennis* (1951)"). 17
Dennis v. United States, 384 U.S. 855 (1966). 7, 8, 14
Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) ("*Kurth Ranch*"). 22, 23, 24, 25
Ex parte Bain, 121 U. S. 1 (1887). 15
Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). 23
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). 18
Fong Foo v. United States, 369 U.S. 141 (1962). 23
Haas v. Henkel, 216 U.S. 462 (1910). xiii, 7, 8, 9, 10, 11, 14, 15
Hammerschmidt v. United States, 265 U.S. 182 (1924). ..... xiii, 9, 10, 11, 12, 14, 15
Hyde & Schneider v. United States, 225 U.S. 347 (1912). . 7
Industrial Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (Rehnquist, J., concurring). 17
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). 18
Marshall Field & Co. v. Clark, 143 U.S. 649 (1892) ("*Field*"). 17
McCarthy v. United States, 394 U.S. 459 (1969). 19
McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). . 15
Menna v. New York, 423 U.S. 61 (1975) (per curium). 19
Morissette v. United States, 342 U.S. 246 (1952). 7
Neder v. United States, 527 U.S. 1 (1999). 7, 15
North Carolina v. Pearce, 395 U.S. 711 (1969). 23
Pinkerton v. United States, 328 U.S. 640 (1946). 12
Salinas v. United States, 522 U.S. 52 (1997). 13

Schick v. Reed, 419 U.S. 256 (1974) (Marshall, J., dissenting). 17
Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). 18
United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1998) ("*Adkinson*"). 13
United States v. Bass, 404 U.S. 336 (1971) ("*Bass*"). 16
United States v. Benchimol, 471 U.S. 453 (1985) (per curium) ("*Benchimol*"). 19
United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993) ("*Caldwell*"). ..... xiii, 10
United States v. Classic, 313 U.S. 299 (1941) (Douglas, J., dissenting) ("*Classic*"). 18
United States v. Cotton, 535 U.S. 625 (2002) (per curiam) ("*Cotton*"). 15
United States v. Cruikshank, 92 U.S. 542 (1875) ("*Cruikshank*"). 17
United States v. Cure, 804 F.2d 625 (11th Cir. 1986) ("*Cure*"). 13
United States v. England, 347 F.2d 425 (7th Cir. 1965) (false return) ("*England*"). 7
United States v. Evans, 333 U.S. 483 (1948) ("*Evans*"). 16
United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973) ("*Galardi*"). 12
United States v. Gradwell, 243 U.S. 476 (1917) ("*Gradwell*"). 17
United States v. Harmas, 974 F.2d 1262 (11th Cir. 1992) ("*Harmas*"). 8, 13, 14
United States v. Harriss, 347 U.S. 612 (1954) ("*Harriss*"). 16
United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) ("*Hudson*"). 17
United States v. Klein, 247 F.2d 908 (2d Cir. 1957) ("*Klein*"). ..... xii, 16
United States v. Lacher, 134 U.S. 624 (1890) ("*Lacher*"). 18
United States v. Lanier, 520 U.S. 259 (1997) ("*Lanier*"). . 16

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) ("*Martin Linen*").....23
United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) ("*Meacham*").....19
United States v. O'Hagan, 521 U.S. 642 (1997) ("*O'Hagan*").....9
United States v. Pease, 240 F.3d 938 (11th Cir. 2001) ("*Pease*").....19
United States v. Peter, 310 F.3d 709 (11th Cir. 2002) ("*Peter*").....19
United States v. Poirier, 321 F.3d 1024 (11th Cir. 2003) ("*Poirier*").....8, 15
United States v. Prentiss, 256 F.3d 971 (10th Cir. 2001) ("*Prentiss*").....15
United States v. Sans, 731 F.2d 1521 (11th Cir. 1984) ("*Sans*").....8, 13
United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957) (false return) ("*Shotwell Mfg.*").....24
United States v. Steele, 117 F.3d 1231 (11th Cir. 1997) ("*Steele I*").....15
United States v. Steele, 178 F.3d 1230 (11th Cir. 1999) ("*Steele III*").....15
United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) ("*Wiltberger*").....17
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).....16

Statutes

18 U.S.C. § 371 (2000).....xi, 5, 7, 15
18 U.S.C. § 371 (*defraud*).....xiii, 5, 8, 13, 14, 15
18 U.S.C. § 371 (United States law).....7, 12, 13, 15
IRC § 7201 (2000).....xi, xiii, 5, 7, 15, 20
IRC § 7201 (*payment*).....xiii
IRC § 7201 (valuation).....xiii
IRC § 7212(a) (2000).....xii, xiii, 5, 8, 15, 16

Appendix A (under separate cover)

(References to 1 App., 2 App., 3 App. and 4 App, are references to the Appendices filed in the 11th Circuit.)

Citations to decisions below

None

Jurisdiction

(i) Date Judgments Entered
Fleming: 4 November 2004 [+90: 2 February 2005]
Arnold: 6 November 2004

(ii) Rehearing, Extension None originally.
60 days (from 9 February 2005) granted to correct what turned out to be improper joinder of parties.

(iii) Rule 12.5 N/A

(iv) Statutes, Jurisdiction
Review by certiorari of decision by court of appeals, 28 U.S.C. §§ 1254(1), 2101(c).

(v) Regarding notice of statutory challenge, Rule 29.4(b)
Technical, strict-construction reading: no *Act of Congress* is challenged. To address the policy of Rule 29.4(b), even if both conditions precedent fail, it's a federal, hodgepodge *non-statute*, treated for 50 years as a statute, that is challenged.
Therefore, "28 U.S.C. § 2403(a) may apply;" this initial filing is served on the Solicitor General; and no prior, formal certification/notice, outside the normal course of litigation, has been issued.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

Key Statutory and Charging Instrument Language

Title 18

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or *to defraud the United States, or any agency thereof in any manner or for any purpose*, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (2000) (emphasis added).

Internal Revenue Code

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to *evade* or *defeat* any tax imposed by this title *or the payment thereof* shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

IRC § 7201 (2000) (emphasis added).

Section 7212(a). Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way *corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes*, or *endeavors to obstruct or impede*, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

IRC § 7212(a) (2000) (emphasis added) (Internal Revenue Code of 1954, ch. 736, 68A Stat. 855 (**Aug. 16, 1954**)). *Cf. Klein*, 247 F.2d at 910-11 (superceding indictment—**Sep. 17, 1954**).

The so-called "Klein conspiracy" language

The "Klein conspiracy" language of Count One. *See* (2 App. Indictment 2 (¶ A)):

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) ... for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes ... through deceit, craft, trickery and dishonest means.

Here's the same language divided into its primary components:

The "Larceny by Trick" Component.

to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) ... through deceit, craft, trickery and dishonest means.

The Added Mens Rea Component.

for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes.

And, here is the same language, supplemented with the relevant source for each hodgepodge element:

The "Larceny by Trick" Component—Sources.

to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (*defraud*)] ... through deceit, craft, trickery and dishonest means [larceny by trick, common-law; *Haas*; *Caldwell*].

The Added Mens Rea Component—Sources.

for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes. *See also Hammerschmidt.*

Citations to additional authority

FED. R. CRIM. P. 11, 32.

18 U.S.C.S. § 13 (Law Co-op. Supp. 2003).
18 U.S.C.S. § 3563(a) (Law Co-op. 2001).
18 U.S.C.S. § 3663A (Law Co-op. 2001).

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 321(d), 5101 (2000).

Statement of the Case

Trial Court Jurisdiction

If jurisdiction exists, 18 U.S.C. § 7.

TraffiCenter—The "Traffic Report" Ad Business

Lawful line of commerce.

Fleming started an advertising business new to the Jacksonville, Florida metropolitan area by setting up ad spots for national advertisers on "traffic reports." The business grossed approximately $600,000 annually. *See* (2 App. "Returns" 1 (Tab 4)); (4 App. "Numerics" (Tab 7)).

Lawful structure—politically incorrect.

Fleming set up a system of business trust entities, of which entities he was neither a trustee nor a beneficiary. Each relevant entity had its own EIN. For a summary of the entities, see (4 App. "Entity Chart" (Tab 8)).

Lawful activities—politically incorrect.

As a manager, Fleming paid the employees in cash, and he set up a checking account with a warehouse bank. He also set up some offshore trading accounts. The limited partnership of which Arnold was a limited partner purchased the business in April, 1996.

Non-reporting issue.

No "returns" were filed for any entity or individual.

Little doubt that these are the key facts that triggered the investigation.

The Confused Indictment

Whose "gross income?"

Not *Fleming's* (or Arnold's)! UNITED STATES OF AMERICA considered all the entities as shams and treated them as set aside ab initio. Then, Plaintiff created a new entity by commingling the funds of multiple business entities. Then Plaintiff attributed the created entity's "income" to Fleming, individually.

Plaintiff created "returns" for Fleming to sign, which

he *never* signed. The "returns" calculated a "tax" based not on what a "responsible party" would pay for any entity, per accounting methods and rates applicable to such entities, but rather upon shifting all the business "income" over to Fleming, individually, using MARRIED FILING SEPARATELY accounting methods and rates. (2 App. "Returns" (Tab 4)).

Yet, Plaintiff confessed from the outset that the "gross income" was not Fleming's, or *any* individual's, but rather that of the business entities. Paragraph C.14 is just one of the many statements that acknowledge this fact.

> 14. It was further part of the conspiracy that DONALD and JOYCE FLEMING failed to file federal individual, corporate,[1] trust or partnership[2] income tax returns in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

(2 App. Indictment 11 (¶ C.14)). *See also* Fleming's Response to Counsel's Second Motion to Withdraw, Point 13, pp. 25-31 ("Fleming's Brief").[3] Charging Fleming criminally for not filing returns for any *entity* recognizes the independence of each *entity's* duty, *and "income."*

Which parties? In what capacity? For what amount?

The indictment charges no entity and nowhere alleges any entity obligation. The indictment neither identifies nor charges any "responsible party" for any entity's alleged obligation. *See* (4 App. 'Entity Chart" (Tab 8)).

Fleming's Overtly Self-breaching Plea "Agreement"

See Fleming's Brief, Points 5-15, pp. 4-47.

The trial court granted Fleming's motion for self-representation, during which time he entered into the plea "agreement." Among the "agreement's" several problems, three jump instantly from the page.

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[1] "TraffiCenter was never incorporated." (2 App. "Plea Agmnt." 12).

[2] Fleming was never a partner of any relevant partnership.

[3] This brief, filed timely in early November, 2003, does not appear on the 11th Circuit's Docket Sheet.

No crime charged.

Count One charges a "Klein conspiracy," a non-offense.

No "property of the United States."

There is no factual basis for the plea. Not one fact alleged or "agreed" to identifies even one ounce of "property of the United States" acquired *at all*, much less wrongfully. United States was not defrauded!

Sentenced on SIX DISMISSED counts!

All counts except Count One, the "Klein conspiracy" count, were "agreed" to be "dismissed," yet Plaintiff's numerics included amounts found only in Counts Two to Five, plus the criminal "employment tax" charges found only in Counts Six (FUTA) and Seven (FICA).

Arnold's Trial

The jury instruction—*defraud.*

See Arnold's Brief, pp. 14-18, 42. "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." (4 App. Instructions 7).

Sentenced on DISMISSED counts!

Plaintiff offered no evidence of "damages" at *trial.* Plaintiff offered ex parte, during *sentencing*, the numerics used against Arnold, which numerics also include the "dismissed" criminal "employment tax" charges.

Sentenced on matters *not even charged!*

Plaintiff charged Arnold as a conspirator helping Fleming avoid *Fleming's* "taxes," 1993-1996, but Plaintiff's sentencing numerics against *Arnold* include 1997 and 1998, years never charged against Fleming! *See* Counts Two to Ten. Thus, Plaintiff confesses *from beginning to end* that the "gross income" is not *any* individual's but rather is the business entities'.

Punitive Double Taxation

For 1996, Plaintiff double-dipped. Plaintiff "taxed" Fleming, individually, on 100% of the business' income.

Plaintiff also "taxed" Arnold, individually, on *another 75%* of that *exact same* business income. *Cf.* (2 App. "Returns" 1 (Tab 4)) *with* (4 App. Numerics (Tab 7)).

Simultaneous Double Jeopardy

In reality, Fleming and Arnold were agents for the same principals (equity owners), and the "income" at issue is that of the entities, not of *any* individual. But, here, let's examine Plaintiff's internally confused view.

The factual focus is that of timing. A typical double jeopardy issue has a clear sequence. Here, the sequence suggested for the "double taxation" issue is artificial, in that it looks solely to sentencing dates. To sentence *Arnold* first, the "first" "tax" would be based upon the 75%; the punitive "second" "tax," on the 100%. The point is that the punitive "tax" and the incarceration are effectively simultaneous, given that they are based on the exact same count in the exact same case on the exact same "income" for the exact same year, 1996.

At Arnold's trial, Plaintiff offered evidence [4] that Fleming had "managerial control." "Control" establishes *legal* ownership, which "tax"-prosecutors use to justify "responsible party" liability for an *entity's* "tax." [5] But, by applying "pass-thru" treatment, Plaintiff treats Fleming as an *equitable* owner; [6] the same with Arnold.[7] Thus, the court, using Plaintiff's legal theories and numerics, simultaneously (A) "taxed," punitively, joint equitable owners of the *exact same* "income," *and* (B) incarcerated them. Thus, the "first" and "second" punishments of the same offense are indistinguishable in time.

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[4] Pounding the point so repetitiously that even Bettman got sick of it.
[5] *See* IRC §§ 641(b), 6672. But Plaintiff never even alleged, much less proved, any *entity's* "tax." The *"tax"* is transferred, *not* the *"income."*
[6] *Cf.* IRC §§ 652(a), 662(a), 667(a). Fleming is not an *equitable* owner; not of the entity Plaintiff created or of the actual entities. (4 App. "Entity Chart" (Tab 8)). *Cf.* (2 App. "Plea Agmnt" 12-13).
[7] This case nowhere even remotely complains of *Arnold's* "taxes," and to talk about ownership at all is to talk about the entities.

Argument

Remedies Requested

Release Pending Appeal.

Petitioners request release pending conclusion of the appellate process.

Reversal of Judgment.

Petitioners request reversal of the appellate opinions and of the judgments and sentences against them.

Summary

Even Klein didn't commit a "Klein conspiracy!"

Defraud has roots in the common-law, with a history closely linked to "larceny by trick." "Obstruct or impede" appears nowhere in 18 U.S.C. § 371. *But cf.* IRC § 7212(a).

The so-called "Klein conspiracy" was first asserted by superceding indictment against Klein, only one month after the congress added IRC § 7212 in 1954. All "Klein conspiracy" variants start with 18 U.S.C. § 371 (*defraud*) for the "larceny by trick" actus reus. Then, the "for any purpose" mens rea is replaced with a *conjunctive*, multi-specific-intent, non-statutory mens rea cocktail, derived from selected elements of IRC §§ 7201 and 7212(a). Then, that mens rea cocktail *becomes* the actus reus, which tries to morph § 371 (*defraud*) into §§ 7201 and/or 7212(a), without having to address "intent to evade" or "corruptly." Even left alone, *defraud* is the wrong legal theory in the "income tax" setting. *Defraud* deals with wrongful *taking*. "Income tax" deals with wrongful *keeping*.

No crime?—no subject matter jurisdiction.

Perspective

"Drug"-case and "Tax"-case prosecutors.

This "tax" case was assigned to a successful Florida "drug"-case prosecution team, whose "drug" efforts are to supported and congratulated. But, the "drug"-case perspective produces a fundamental flaw for a "tax" case.

Since engaging in illegal drug activity is fully *illegal*, an entity set up to engage in that line of commerce is unlawful ab initio. Such entity is properly set aside, and, thus, factually, all of the activity, e.g., "income," is properly attributed to the individuals.

However, engaging in the ad business is fully *legal*. And entities set up to engage in the ad business are also fully *legal* ab initio. The entities have a lawful purpose. Enron is not set aside for its *transactions*; Microsoft, the same. Each of these entities has a lawful purpose.

Entities may be liable, under both Title 18 and the IRC, as principal or conspirator. If Enron or Microsoft had engaged in non-reporting, what "tax"-prosecutor would annihilate the entity and charge all the "income" to the CEO or CFO? "Managerial control," thus "responsible party" liability, is *completely* dependent on the existence of the entity. But, Plaintiff, as is habit in "drug" cases, ran over roughshod, demolished, annihilated, the entities. This "drug"-case treatment of entities renders *any* "tax" charges against such entities legally impossible.

Since the "gross income" at issue is that of the entities', not of any individual, by annihilating the fully *legal* entities, set up with independent EIN's, Plaintiff disclaimed any and all interests.

No entity?—no "responsible party," and no conspiracy.

No Subject Matter Jurisdiction

1. What does *defraud* mean?

For Questions 1 and 2, see Arnold's Brief, Points 1, 2 and 4 thru 7. (Fleming's Brief adopted these Points.)

The appellate opinion epitomizes the problem.

Cf. "William Arnold, proceeding pro se, appeals his sentence and conviction for conspiracy to defraud the United States, in violation of *18 U.S.C. § 371*" (Arnold Op. pp. 1-2) (emphasis added) *with* (A) "the district court's

definition of *fraud*" (*id.* p. 2) (emphasis added), (B) "taxes that Fleming *evaded*" (*id.* p. 4) (emphasis added) *and* (C) "Under § 2T4.1(G), a defendant who is found guilty of *tax evasion*" (*id.* p. 5) (emphasis added).

Tax evasion is defined by IRC § 7201, *not* 18 U.S.C. § 371, and there are two types, *valuation* and *payment*, for which the evidentiary standards are *quite* different. The *payment* case requires an assessment. *See England*, 347 F.2d 425. This is *not* a "§ 371 (*US law*)—§ 7201" case!

Common-law canon.

Defraud is rooted in the common-law, meaning that the canon applies. *Neder*, 527 U.S. at 21-25; *Carter*, 530 U.S. at 264-67; *Morissette*, 342 U.S. at 250-63, in particular 260-63.

Defraud—By the elements.

Defraud is defined by its canonical elements this way:

(1) to *acquire*

(2) property (rights)

(3) known by the accused to be property not owned by the accused

(4) by trick or deceit (i.e., without consent),

(5) with the intent to *acquire* the property wrongfully. *See Bell*, 462 U.S. at 358-60 (larceny definitions); *Haas*, 216 U.S. 462 ("exclusive use" information); *Morissette* 342 U.S. 246 (mens rea, personal property); *Hyde & Schneider*, 225 U.S. at 350-54 (land); *Dennis*, 384 U.S. at 860-62 (use of NLRB facility under false pretenses).

Conclusion.

To *defraud* is to *acquire* [8] property wrongfully. *Tax evasion* deals with *keeping* property wrongfully. A perceived failure of a duty to *pay over* a "tax" does not even remotely ask about *acquisition*.

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[8] Otherwise, § 371 (*defraud*) and "§ 371 (US law)—IRC § 7201" define the same crime, meaning that the crime is doubly defined.

2. Does 18 U.S.C. § 371 (*defraud*) alter that definition?

Narrowing Element (2).

What § 371 (*defraud*) does, and *all* that § 371 (*defraud*) does, is *narrow* element (2), as follows:

(2) property (rights) *of the United States or an agency thereof.*

The 11th Circuit applies the common-law canon ...

> In *McNally v. United States*, 483 U.S. 350 ... (1987), the Supreme Court held that wire and mail fraud statutes protect only property rights, and that the words "to defraud," as used in the statutes, "usually signify *the deprivation of something of value* by trick, deceit, chicane or overreaching." *Id.* at 358 ... (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, ... (1924)) [internal quotes omitted].

Poirier, 321 F.3d at 1029 (emphasis added).

... except in the "income tax" context.

Here's the jury instruction: "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." *See* Arnold's Brief, pp. 14-18, 42. (4 App. Instructions 7).

Two problems. (A) Actus reus *substitution*: "interfere with or obstruct" for "wrongful *acquisition*." *Cf.* § 7212(a). (B) Interfere, obstruct, etc., are *mens rea* elements! *Haas*.

Cf. "Regardless, because a violation of § 371 does not require the wrongful acquisition of property" (Arnold Op. p. 4) (11th Cir. 2004) *with* "The Legal Theories in Proper Application," *infra*, p. 13, featuring *Dennis* (1966), *Sans* (11th Cir. 1984) and *Harmas* (11th Cir. 1992).

The infamous sentence from *Haas*.

> The statute [now § 371 (*defraud*)] is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.

Haas, 216 U.S. at 479.

Here is the sentence again, with two different focuses highlighted. **The bold highlights the Court's point.** *The italics show the root of the mens rea cocktail.*

> **The statute is broad enough** in its terms **to include any conspiracy** *for the purpose of impairing, obstructing or defeating the lawful function of* [i.e., **targeting**] **any department** of government.

The *Hammerschmidt* context—no *financial* loss.

Recognizing this difference, the Court in *Hammerschmidt* stated this:

> We think the words relied on cannot be given such a wide meaning when we consider the case to which they are applied, and when we replace them in the context.

Hammerschmidt, 265 U.S. at 186.

Here's the context. The indictments in *Haas* charged essentially the same type larceny offense described in *O'Hagan*, 521 U.S. 642 (unauthorized use of "exclusive use only" information). *Haas*, 216 U.S. at 477-78. In *Haas*, the "exclusive use only" information was "owned" by the Department of Agriculture! *Id.* at 479-80. Thus, the defendants committed *larceny* against the agency, rendering the *defrauding* charge *fully* applicable.

In response, Haas argued that *defrauding* must result in a *financial* loss. The Court held otherwise, and *this* is where we find the immediate context.

> These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy

> shall contemplate a financial loss or that one shall result. [The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government.]

Hammerschmidt, 265 U.S. at 187 (quoting *Haas*, 216 U.S. at 479). The Court neither *remove* the actus reus of "wrongful *acquisition*" nor *add* any mens rea. Nor do they *substitute* a mens rea cocktail for the actus reus!

Recognition of § 371's scope.

Thus, *Haas* teaches two points.

Lesson 1. No *financial* loss required. Intangible property interests are just as protected as tangible.

Lesson 2. The great stumbling block during the past 50 years is misreading *Haas* regarding the *scope*. The *scope* is not limited solely to "property of the *United States*," for it protects the *agencies'* property, as well.

Improper use of "exclusive use only" information is larceny. No additional, tangible, *financial* loss need be proved. And, by applying the statute's *scope*, the Court *is not* redefining *defraud*. They neither add the mens rea of "for the purpose of impairing, obstructing or defeating," nor eliminate the "wrongful *acquisition*" element. The Court confirms the *scope* by recognizing "**any conspiracy [to *defraud* that targets] any department.**" *Haas applies*, rather than *alters*, the ancient canon.

Another illustration of recognition of the *scope* of the statute is *Caldwell*, which provides a perfect example of both the problem and the fix. *Caldwell* boldly cites *Haas* as authority for *Haas*' exact *antithesis!* "The conspiracy need not aim to deprive the government of property." *Caldwell*, 989 F.2d at 1058 (focus added). What *Haas* actually says is that such conspiracy "need not aim to deprive the United States of property," which is true because the statute's *scope* includes any conspiracy that aims to deprive *any "agency"* of property, as well.

"United States" + "agencies" = "government"

Thus, the fix is simple: change the generic reference to the specific name; i.e., to apply this statute's intended scope, distinguish United States from its "agencies." By doing so, we apply properly Lesson 2 from *Haas*.

Hammerschmidt also applies the proper *scope*, as shown in the analysis that distinguishes between tangible and intangible property interests, as discussed in *Haas*.

> To conspire to defraud the United States, means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental function by deceit, craft or trickery, or at least by means that are dishonest [the *Haas* mens rea *becomes* the actus reus!]. It is not necessary that the government shall be subject to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. *They refer rather to wronging one in his property rights by dishonest methods or schemes.* One would not classify robbery or burglary among frauds. In *Horman v. United States*, 116 Fed. 350, § 5480, Rev. Stats. as amended March 2, 1889, c. 393, 25 Stat. 873, [the court construed the *mail fraud* statutes to include blackmail.] The decision, however, went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose. ... *Its construction in the Horman Case cannot be used as authority to include within the legal definition of a conspiracy to defraud the United States a mere open defiance of the governmental purpose to enforce a law*

by urging persons subject to it to disobey it.

Hammerschmidt, 265 U.S. at 188-89 (emphasis added).

The necessary scope of *defraud* in the mail fraud context *does not* expand *defraud* in the § 371 context.

> No conspiracy exists without a substantive offense. It should require no citation of authority to say that a person cannot conspire to commit a crime against the United States when the facts reveal that there could be no violation of the statute under which the conspiracy is charged.

Galardi, 476 F.2d at 1079 (construing § 371 (US law)).

> The common-law rule that the substantive offense, if a felony, was merged in the conspiracy [footnote omitted], has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. [citations omitted]. A conviction for the conspiracy may be had though the substantive offense was completed. [citations omitted]. And the plea of double jeopardy is no defense to a conviction for both offenses. [citations omitted]. ... It [the conspiracy] has ingredients, as well as implications, distinct from the completion of the unlawful project. ... [Some overt acts are perfectly legal; some illegal.] The agreement to do an unlawful act is even then distinct from the doing of the [illegal] act [in furtherance of the conspiracy]. [footnote omitted].

Pinkerton, 328 U.S. at 643-44.

The merger theory exists because the conspiracy and its substantive offense are symbiotically related. No conspiracy exists until a defined crime is the objective.

> A conspirator must intend to further an endeavor which, if completed, would satisfy *all the elements of a substantive criminal offense*, [and] it suffices that he

adopt the goal of furthering or facilitating the criminal endeavor.

Salinas, 522 U.S. at 65 (emphasis added).

Section 371 (*defraud*) requires objective of *defrauding*.

GENERIC CONSPIRACY ELEMENTS DEFINE NOTHING.

The generic elements are these:

(1) the existence of an agreement to achieve an unlawful objective;

(2) the defendant's knowing and voluntary participation in the conspiracy; and

(3) the commission of an overt act in furtherance of the conspiracy.

Harmas, 974 F.2d at 1267 (quoting *Cure*, 804 F.2d at 628-30). *Cf. Adkinson*, 158 F.3d at 1153 (Arnold Op. p.4) (*overt* act, conspiracy/agreement). What's still missing is identification of a substantive offense as the objective. No conspiracy is even defined without its substantive offense.

"CONSPIRACY TO DEFRAUD" ELEMENTS.

The elements for the § 371 (*defraud*) conspiracy are logically defined and completed this way:

(1) the existence of an agreement [to *defraud* the United States (or an agency thereof)];

(2) the defendant's knowing and voluntary participation in the conspiracy [to *defraud*]; and

(3) the commission of an overt act in furtherance of the conspiracy [to *defraud*].

The Legal Theories in Proper Application.

Harmas properly distinguishes the two disjunctive sanctions set forth in § 371, namely § 371 (*defraud*) and § 371 (US law). *Harmas*, 974 F.2d at 1266-68. *Harmas* also looks to *Sans*, 731 F.2d at 1533-35, to support (properly so) the notion that the *defraud* sanction need *not* refer to another statute, whereas the "United States law" sanction *necessarily* does. *Harmas*, 974 F.2d at 1266 (citing *Sans*, 731 F.2d at 1534). This follows from the fact

that the common-law canon supplies the definition of *defraud*. Per that canon, as cited, *supra*, Question 1, p. 7, *defraud* means and refers to a wrongful *acquisition*.

In full support of this entire line of analysis, *Harmas* cites *Dennis*. In *Dennis*, the target property interest sought by wrongful *acquisition* was "use" of the NLRB's facility. *Dennis*, 384 U.S. at 861-62. Thus, a "conspiracy to defraud" (complete with agreement "to *defraud*," voluntary participation and overt act) exists, because *defraud*, as defined by the common-law canon, exists, as follows: (1) *acquisition* (2) of property (rights) (here, "use" of the NLRB's facility (Lesson 2: scope intends to include "agency;" *Haas*, *Hammerschmidt*); "use" is an intangible interest, not necessarily tied to a *financial* loss (Lesson 1: *Haas*, *Hammerschmidt*)) (3) known by the accused not to be owned by the accused (4) by trick or deceit (false Affidavits), (5) with the intent to so acquire that property interest wrongfully. In sum, it's all there.

The elements of *defraud* all *existed* in *Dennis*. By *extreme* contrast, not *one* exists here. ***Not one!*** This happens where the legal theory applied is incompetent from the threshold. "Income tax" and *defraud* don't mix.

No *defrauding*?—no "conspiracy to defraud."

Conclusion.

Nothing about 18 U.S.C. § 371 (*defraud*) alters the common-law definition of *defraud*. In fact, outside the "income tax" context, *defraud* is applied quite correctly.

Thus, the "Klein conspiracy" language derives not from an alteration of *defraud*, but rather from a contortion of *Haas*, which contortion (A) *removes* the actus reus of "wrongful *acquisition*;" (B) *adds* a hodgepodge, multi-specific-intent, non-statutory mens rea cocktail (1) not found in 18 U.S.C. § 371 and (2) never even remotely found in the canon for *defraud*; and (C) *replaces* the actus reus with the mens rea cocktail. In short, via the "Klein conspiracy," the prosecution rewrites §§ 7201 and 7212(a), avoiding "intent to evade" and "corruptly."

3. By what procedure is a crime defined?

See Arnold's Brief, Point 4, pp. 27-35.

Standard of Review.

See Arnold's Brief, pp. 2-5.

"Whether an indictment sufficiently alleges a statutorily proscribed offense is a question of law. ... We review questions of law *de novo*." *Steele I*, 117 F.3d at 1233 (focus added) (citations omitted). *See also Steele III*, 178 F.3d at 1233.

If the "Klein conspiracy" *is* a statutory offense, i.e., if it's statutory for the executive (via the prosecutor) to replace the legislatively enacted "for any purpose" with a highly prejudicial, hodgepodge, multi-specific-intent mens rea cocktail, then the indictment is still fatally flawed and the judgments still properly reversed. Because *defraud* requires a wrongful *acquisition*, even if one presumes every single fact alleged in Count One to be true, it still alleges no *defrauding*. But, given the timing of the indictment (27 June 2000), and *Cotton*, 535 U.S. 625 (2002), which overruled *Ex parte Bain*, 121 U. S. 1, a question arises as to whether that error is *framework* and *structural*, thus a subject matter jurisdiction question (de novo review), or *constitutional*, hence a "merits" issue ("plain error" review). *Neder*, 527 U.S. 1 (1999); *Prentiss*, 256 F.3d 971 (10th Cir. 2001); *McCoy*, 266 F.3d 1245 (11th Cir. 2001); *Poirier*, 321 F.3d 1024 (11th Cir. 2003).

Has the "Klein conspiracy" *ever* been a crime?

"KLEIN CONSPIRACY" LANGUAGE IS NON-STATUTORY.

One readily finds 18 U.S.C. § 371, and one can distinguish between § 371 (*defraud*) and § 371 (United States law) just fine. Section 371 isn't the problem. First, "for any purpose" is replaced with a fanciful, multi-specific-intent mens rea cocktail, drawn from IRC § 7201 (both *valuation* and *payment*), and from IRC § 7212(a) (omnibus) (which depends upon "corruptly"), and from *Haas* (and *Hammerschmidt*), but not by legislative act. *Cf.*

Klein, 247 F.2d at 910-11. Then, as demonstrated by *both* the jury instruction *and* Fleming's plea "agreement" (*cf.* ¶ A.1 *with* ¶¶ 1 & 4, p. 11 *and* the last ¶, p. 16), the non-statutory mens rea cocktail *becomes* the actus reus! *Cf.* § 7212(a). In short, a "Klein conspiracy" is a prosecutorial rewriting of both §§ 7201 and of 7212(a).

DUE PROCESS "PRINCIPLE OF LEGALITY" IS VIOLATED.

There's a blatant violation of substantive due process, for there is no statute, thus no notice, no "fair warning." "The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [*Bouie*, 378 U.S. at 351 (quoting *Harriss*, 347 U.S. at 617.)]" *Lanier*, 520 U.S. at 265 and n.5. Each of these opinions analyzes an existing statute. Where an existing, published legislative act may be vague, and run afoul of the "principle of legality," a non-statutory mens rea cocktail must be all the more vague. *See City of Chicago v. Morales*, 527 U.S. at 55-56.

SEPARATION OF POWERS IS VIOLATED.

There's also an egregious separation of powers problem. A crime is defined only by legislative act. *Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48 (rule of lenity—(1) common language (2) legislatively enacted). *Bass* distinguishes court-defined crimes from legislatively defined crimes. There's a thunderous silence regarding the executive, suggesting that it doesn't even come to mind to need to be mentioned that the executive doesn't define crimes. *See also Evans*, 333 U.S. at 486 and n.4 ("In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.") Further, the scope of executive authority to be exercised under color of law, even under war powers and in a state of emergency, is specifically defined by statute. *Youngstown Sheet & Tube Co.*, 343 U.S. 579. The executive acts well beyond the scope of the employment

contract to purport to define a crime. Surely a trial court exceeds its authority even to acknowledge as a definition of a crime language dreamed up by the executive.

Even in this present state of "object or waive," there are certain challenges to the system's very structure that a defendant can *never* waive. Way at the top of that list is the objection to the executive's attempt to legislate. *Cruikshank*, 92 U.S. at 556-59 (overbroad indictment; prosecutor to follow, not create, the law; questions of law are for the court, not the prosecutor).

Executives have no authority to define crimes. *Industrial Union Dep't*, 448 U.S. at 672-77 (Rehnquist, J., concurring; citing *Field*); *Dennis* (1951), 341 U.S. at 525-26 ("those whose duty it is to legislate," p. 525) (Frankfurter, J., concurring). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field*, 143 U.S. at 692; *Schick*, 419 U.S. at 273-76 (Marshall, J., dissenting) (no authority to expand sentence by prohibiting parole).

> We enter perilous territory because, as stated in [*Gradwell*, 243 U.S. at 485] there is no common-law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." [*Hudson*, 11 U.S. (7 Cranch) at 34.] If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in [*Wiltberger*, 18 U.S. (5 Wheat.) at 105], "probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly another to read into the vague and general language of an act of Congress specifications of crimes. We should

> ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." [*Lacher*, 134 U.S. at 628.]

Classic, 313 U.S. at 331-32 (Douglas, J., dissenting).

There are certain Due Process rights, substantive and procedural, that the courts are uniquely positioned to protect. The mere infringement or encroachment of separation of powers compels the exercise of the judicial power, *sua sponte* where necessary, within the context of the case or controversy, to curtail any executive's attempt to define a crime. "The territory to which the jurisdiction extends" represents even a different time, place and plane from the transitions Chief Justice Marshall witnessed, but surely he's still correct about the commonwealth's inherent authority of self-defense, held in sacred trust, that is the judicial power. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (the Court is limited *because* the legislature is limited); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (state legislative power limited by estoppel); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (state legislatures *and* executives derive authority *only* from terms specifically declared).

Conclusion.

The procedure by which a crime is defined is the legislative process.

The executive is prohibited, even under an emergency, even exercising so-called war powers, from defining a crime. There is nothing about a prosecutor's taking § 371 (*defraud*) and substituting a hodgepodge mens rea cocktail for an actus reus of ancient origin that remotely satisfies even a colorable exercise of legislative authority.

Since Count One, the sole count in Fleming's plea "agreement," and the sole count on which Arnold was tried, charges no violation of any statutory offense, the trial court never had subject matter jurisdiction over Count One. The judgments are properly reversed.

No Plea Agreement

4. Can an instantly self-breaching plea agreement support a judgment?

See Fleming's Brief, Points 5-15, pp. 4-47.

No crime charged.

Where the indictment doesn't charge a crime at all, the defect is jurisdictional. *Peter*, 310 F.3d at 712-13. Also, "a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " *Id.* at 713 (citing *Meacham*, 626 F.2d at 509-10). *See also Menna*, 423 U.S. at 62-63 and n.2 (non-offense due to application of Double Jeopardy; objection not waived by plea). Thus, a guilty plea does not waive the objection that the indictment fails to charge an offense. *Pease*, 240 F.3d at 942-43.

While *McCarthy*, 394 U.S. at 464-67, addresses a unique procedural issue, it still confirms the general concept that where the *court* can't "understand" (recognize, take jurisdiction over) a non-offense, there's no way a *defendant* can "understand" it, either.

No "property of the United States."

As discussed in Questions 1 and 2, the foundational substantive crime of *defrauding* was never even alleged. There is no wrongful *acquisition* even remotely at issue. Equally non-existent is any reference even to one ounce of "property of the United States."

Sentenced on SIX DISMISSED counts!

See Fleming's Brief, Points 16-19, pp. 48-52.

One "agreed" term, *see Benchimol*, 471 U.S. at 455, was that *all* counts except the "Klein conspiracy," Count One, were to be dismissed. (2 App. "Plea Agmnt."). But, *all* Plaintiff's numerics are from SIX DISMISSED counts!

There being no "property of the United States" at issue, much less wrongfully *acquired*, the maximum numeric amount is **$0.** To have *any* other amount is to

include DISMISSED charges in the numerics. To compare the "agreement" with the indictment, (2 App. Indictment), we find, by mere inspection, that the "income tax" amounts derive *not* from Count One, *defrauding*, but rather from DISMISSED Counts Two (1993), Three (1994), Four (1995) and Five (1996), which allege violation of IRC § 7201.

The criminal "employment tax" charges, Counts Six (FUTA) and Seven (FICA), were "agreed" to be DISMISSED, but the "employment tax" amounts feature *prominently* in Plaintiff's numerics.

Conclusion.

This preposterous, instantly, overtly, egregiously, self-breaching "agreement," which Plaintiff drew up, cannot possibly support a judgment. To look into the actual terms of the deal made is to see, by mere inspection, that the "agreement" is a sham. There being no agreement, there can be no judgment based upon it.

No Evidence; Ramshackle Sentencing

5. **Are ex parte presentations of purported "damages," offered for the first time at sentencing, *testimonial statements*?**

6. **Based on what evidence is the threshold "maximum sentence" determined, by which a subsequent upward (or downward) departure is then taken?**

What is a *testimonial statement*?

(*See* Arnold's Brief, Points 5-12, pp. 37-52.) This is the question left open in the recent analysis in *Crawford v. Washington*, 541 U.S. 36 (2004). Whether the definition is better supplied by description or by a seriatim listing of examples, this case contains the same problem.

Where "damages" evidence is not admissible per "judicial notice," such evidence must be *testimonial*.

This case focuses *entirely* on *Fleming's* "taxes." [9] Plaintiff first presented the numerics used against Arnold at sentencing. Arnold immediately objected, by way of Affidavit. Those numerics were never (A) agreed to, (B) introduced before the jury or (C) subjected to cross-examination. *Blakely v. Washington*, 542 U.S. —, 124 S. Ct. 2531 (2004). Therefore, the trial court's use of that inadmissible information is reversible error. *Id.*

The "maximum sentence" looks to what evidence?

As stated squarely in *Blakely*, where upward (or downward) departures must look to trial evidence, the threshold "maximum sentence" may be determined solely by trial evidence (or evidence otherwise agreed to). *Blakely*, 124 S. Ct. at 2536-38.

Here, the trial evidence of "property of the United States" *defrauded* is in the amount of **$0**, which happens also to be the amount originally pled in Count One, given that Count One pled no *defrauding* at all. Therefore, **$0** is the evidence on which the threshold "maximum sentence" could ever *possibly* be based. That's level 6, not 18.

Conclusion—Questions 5 and 6.

These two directly related evidence Questions focus on the relationship between trial and sentencing. Trial is very much irrelevant where sentencing looks to ex parte presentations never subjected to cross-examination and even to *new charges* nowhere found in the indictment! "Damages" evidence is *testimonial*; it must be admitted to or tried. "Maximum sentences," as with departures from the "maximum," must look solely to evidence admitted to or tried. To use any other information is error.

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[9] If *Fleming* "owned" it all, (4 App. Indictment ¶ C.11 p. 11), from where comes the *remotest* notion of *Arnold's* "taxes" for *any* year? With or without § 371, *where* is *Arnold* anywhere charged for *his* "taxes?!" DISMISSED Count Five focuses on *Fleming's* 1996 "taxes!"

Double Taxation, Simultaneous Double Jeopardy

7. Can either judgment stand where they create "simultaneous double jeopardy?"

See Arnold's Brief, Points 13-16, pp. 53-61 (Fleming's Brief, Points 20-23, pp. 53-54, adopting Arnold's Brief).

The Entity Plaintiff Created.

For this case, Plaintiff created a new entity by commingling funds from multiple business entities. Fleming never agreed to be responsible for that creation, as evidenced by his *never* signing the "returns" Plaintiff compiled. (2 App. "Returns"). *Cf.* (2 App. "Plea Agmnt").

The "Ownership" Plaintiff Created.

For 1996, Plaintiff attributed 100% of that *entity's* "income" to Fleming, and *another 75%* to Arnold. (2 App. "Returns" 1); (4 App. Numerics). Plaintiff "taxed" Fleming on the 100%, and "taxed" Arnold on *another 75%* of that *exact same* "income." In both cases, Plaintiff used "pass-thru" treatment, meaning that Plaintiff treated both Fleming and Arnold as simultaneous equitable owners of the exact same "income" of the entity Plaintiff created by way of commingling.

Simultaneous Double Jeopardy.

Thus, by Plaintiff's very own theory of ownership, this "double taxation" is facially punitive. *Kurth Ranch.* Punitive "taxation" plus incarceration gives rise to the double jeopardy issue. *Id.* Ordinarily, there'd be an identifiable sequence. Here, the punitive "taxation" and the incarceration arise from the two judgments on the exact same count in the exact same indictment regarding the exact same "income" for the exact same year, 1996. Nothing about different sentencing dates changes the fact that the sentences arise from the same count in the same indictment. And, per those judgments, the punitive "taxation" and the incarceration occur simultaneously.

Multiple punishments prohibited.

Multiple punishments for the same offense are unlawful. *Ex parte Lange*, 85 U.S. (18 Wall.) at 168-74; *North Carolina v. Pearce*, 395 U.S. at 717. *See also Kurth Ranch*, 511 U.S. at 778-84.

Double jeopardy normally operates to prevent the second punishment, but where the first and second punishments occur simultaneously, double jeopardy must operate to prevent both punishments. In short, both judgments must be set aside.

Named entities.

Anyone subject to criminal sanctions, whether directly or vicariously through an agent, *must* be afforded protection from the "witch hunt." In *Fong Foo* and *Martin Linen*, the entity (the agent) is a named party, and its owners (the principals) benefited from double jeopardy protection.

Entities not named.

What about the entity that is *not* a named party in the criminal suit? To look at equitable ownership and disclosed agency, where the equitable owners of the entity are at jeopardy via any agent, the equitable owners are in jeopardy, whether or not the entity is a named party. This is the principle applied in *Kurth Ranch*. The entity Plaintiff created is not a named party to this litigation.

Attachment.

When does jeopardy attach to an equitable owner of an entity, which entity is not a party to the criminal suit? When it attaches to any disclosed agent of that owner.

Both of the following examples are rather subtle on this point, but both clearly support this rule. In *Kurth Ranch*, the individuals were busted for marijuana. Ultimately, the entity, the Kurth Ranch, sought Chapter 11 bankruptcy protection. While Chapter 11 *is* available to individuals, it is not accidental that *all* the opinions on that matter are in the name of the *entity*, the Kurth

Ranch. The Montana "drug"-case team "taxed" the *entity*[10] pursuant to Montana's then new "dangerous drug" "tax" provision, which includes a threshold requirement that the party "taxed" first be arrested. *Kurth Ranch*, 511 U.S. at 770-71, 781-82. The *entity* was never charged, must less "arrested." Thus, for the *criminal* suit, the entity was *not* a named party, and the Court noted that the "proper party" issue was never raised at trial. *Id.*, at 772 n.9. Every single federal court involved denied Montana's effort to collect that "dangerous drug" "tax" in the bankruptcy proceeding.

The "proper party" issue being so predominant, the insightful double jeopardy discussion pales in comparison. Still, the Court ruled on the double jeopardy issue, judging the "tax" as punitive, making it subject to double jeopardy censure. Thus, regarding that one offense, the equitable owner(s) of the Ranch became subject to the prohibited *second* punishment when the *entity*, as an *agent*, became subject to its *first* punishment, in bankruptcy, via the punitive "tax." The Court properly censured the *second* risk, incarceration, to which at least one of the equitable owners was made subject.

We see the same type of "equitable owner"/agent connection in *Shotwell Mfg.* The entity is a named party, but the double jeopardy discussion focuses almost exclusively upon the "responsible parties." The double jeopardy issue was resolved instantly, because remand doesn't trigger double jeopardy. *Shotwell Mfg.* 355 U.S. at 243. However, by even reaching that ruling, the double jeopardy rule is applied, meaning that the *entity's* "tax" issue and the "responsible party's" double jeopardy protection are directly connected, which must be the case, given that the entity and its "responsible party" (*legal* interest owner) are both agents for the same principal(s) (the *equitable* interest owner(s)).

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[10] Which is the flip side to the "wrong party" problems in this case.

In short, when any equitable owner's disclosed agent is named in the criminal litigation, double jeopardy censure attaches to protect that equitable owner. Otherwise, the equitable owner is wide open to multiple punishments via *multiple and separate* punishments on multiple and separate agents for the same offense.

Plaintiff is hoisted by its own petard!

Staying completely within Plaintiff's fiction,[11] Plaintiff created the entity and then attributed equitable ownership to both Fleming and Arnold, via "pass-thru" treatment. While both a trust model and a partnership model apply, the partnership model is simpler. Where Fleming and Arnold are partners in the entity Plaintiff created, each is also an agent of the partnership. Thus, applying *Kurth Ranch*, a punitive "tax" on the whole of the partnership's "income" triggers double jeopardy protection for all who are considered simultaneous owners of that exact same income. Once a punitive "tax" exists or incarceration, the other is a second punishment.

In *Kurth Ranch*, the sequence was clear. Here, the punitive "taxation" and the incarceration occur in the same judgment. And, since the sentencing dates provide an artificial sequence for these purposes, the double sentences on the same offense occur at the same time.

Conclusion.

These judgments exact a punitive "tax" and order incarceration for the same offense at the same time. Since multiple punishments for the same offense are unlawful, and since it's not legally possible to distinguish the "first" from the "second" punishments here, it follows that both punishments must be set aside, meaning that both judgments must be set aside.

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[11] The argument on appeal mixed the reality in with the fiction. Staying completely within the one or the other tends to produce an internally consistent picture that is easier to describe.

Conclusion

The United States court of appeals has upheld the executive's redefining of *defraud*, for 18 U.S.C. § 371 (*defraud*) in the "income tax" context, which (A) removes the actus reus of "wrongful *acquisition*," (B) adds a hodgepodge, multi-specific-intent mens rea cocktail, and (C) substitutes that mens rea cocktail for the actus reus. This construction conflicts with the ancient common-law canon, with longstanding federal law, with relevant decisions of this Court, with relevant decisions of other courts of appeals and even with its own precedent.

By not requiring that a conspiracy specifically identify, from the indictment forward, a (statutorily) pre-defined offense as its objective, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Whether the "Klein conspiracy" language even defines a crime is an important question of federal law that has not been, but should be, decided by this Court.

By (A) allowing the prosecution to morph a § 371 (*defraud*) charge into a "§ 371 (US law)—§ 7201" charge (and into a § 7212(a) charge), (B) not recording Fleming's Response to Counsel's Second Motion to Withdraw in its Docket Sheet, (C) suggesting that Fleming "understands" a non-offense sufficiently so as to be able to enter a plea, (D) not setting aside a judgment that is based on a flagrantly self-breaching plea "agreement," and (E) affirming Fleming's sentence, which is based on SIX DISMISSED counts, including two criminal "employment tax" charges, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and

(2) so far departs from the accepted and usual course of judicial proceedings, and sanctions the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By (A) allowing the prosecution to morph a § 371 (*defraud*) charge into a "§ 371 (US law)—§ 7201" charge (and into a § 7212(a) charge), (B) not correcting the plainly erroneous jury instruction, (C) upholding a jury verdict despite the complete absence of any evidence of *defrauding*, (D) affirming Arnold's sentence, which is based, in part, on DISMISSED counts (all of Plaintiff's numerics are based on DISMISSED counts, including the two criminal "employment tax" charges), and in part on charges *never filed*, and (E) affirming Arnold's sentence, which is based, exclusively, on information acquired post-trial, never agreed to, and never subjected to cross-examination, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court, with relevant decisions of other courts of appeals and even with it own precedent, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

And, by upholding *both* judgments at issue, despite the simultaneous punitive "taxation" and incarceration, which triggers double jeopardy protection, thus which requires the setting aside of *both* judgments, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Remedies Requested

1. Petitioners request that this Court grant the petition, issue the writ of certiorari and take jurisdiction of these matters.
2. Petitioners request release pending appeal.
3. Petitioners request reversal of the opinions on appeal, and, ultimately, reversal of the trial court judgments and sentences against them.
4. Should the Court identify additional issues for briefing, Petitioners request leave to submit such supplemental briefs.
5. Petitioners request the non-argument calendar. Oral argument is not expected to aid the resolution of these issues.
6. Petitioners request that costs be taxed to Respondent.
7. Petitioners request any and all other relief at law, in equity or sui generis to which they may show themselves justly entitled.

Respectfully submitted,

William Allen Arnold, *pro se*
c/o 4342 Forrest Road
Columbus, Georgia 31907

Presently,
William Allen Arnold, No. 94241-071
2225 Haley Barbour Parkway
Yazoo City, Mississippi 39194

(2)

Supreme Court, U.S.
FILED

No. 04-1345 JAN 24 2005

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

WILLIAM ALLEN ARNOLD,
Defendant-Appellant-Petitioner

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A

WILLIAM ALLEN ARNOLD, *pro se*
C/O 4342 FORREST ROAD
COLUMBUS, GEORGIA 31907

Table of Contents

Rule 14.1(i)(i)—Appellate Opinions 1A

2004 Nov 6 Arnold Opinion 1A

2004 Nov 4 Fleming Opinion 10A

Rule 14.1(i)(ii)—Additional Orders 13A

Trial Court 13A
2003 Apr 28 Final Judgment—Fleming 13A
2003 Apr 28 Final Judgment—Arnold 26A
2003 Aug 11 Order denying Arnold's motion for release pending appeal 37A

Appellate Court 39A
2003 Jun 24 Order–Denying Flemings' appointed counsel's first motion to withdraw 39A
2003 Jun 24 Order–Denying Fleming's appointed counsel's second motion to withdraw. 40A
2003 Oct 16 Order–Denying without opinion Arnold's Release Pending Appeal 43A

Rule 14.1(i)(v)—Statutes and Rules 44A

Federal Rules of Criminal Procedure 44A
Rule 11. Pleas 44A
Rule 32. Sentence and Judgment 48A

Title 18 ..... 55A
Section 13. Laws of States adopted for areas within Federal jurisdiction 55A
§ 3563. Conditions of probation 57A
§ 3663A. Mandatory restitution to victims of certain crimes 59A

Title 28 ..... 62A
§ 3002. Definitions 62A

Title 31 ..... 65A
Section 321. General authority of the Secretary 65A
Section 5101. Decimal system 65A

Rule 14.1(i)(vi)—Additional Essential Materials 66A

Trial Court 66A
2000 Jun 27 Indictment (Counts One to Ten (of 19)) 66A
2000 Dec 20 Fleming's Plea Agreement 92A
Numerics Numerics conjured for Fleming 108A
Numerics conjured for Arnold... 110A

Rule 14.1(i)(i)—Appellate Opinions

2004 Nov 6 Arnold Opinion

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 06 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12810
Non-Argument Calendar

D. C. Docket No. 00-00262-CR-3-J-20HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM ALLEN ARNOLD,
JOSEPH WELBURN EVANS,

Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(November 5, 2004)

Before CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

William Arnold, proceeding pro se appeals his sentence and conviction for **[⊥ 2]** conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and Joseph Evans appeals his conviction for the same offense. The indictment specifically alleged that Arnold and Evans

separately formed two limited partnerships, Jimal Enterprises and Global Enterprises, in order to purchase business assets owned by codefendant Donald Fleming, for the purpose of concealing and disguising Fleming's true income, thereby impeding the lawful tax assessment and collection functions of the Internal Revenue Service (IRS).

William Arnold

On appeal, Arnold argues that the district court had no subject matter jurisdiction because the indictment was insufficient due to the fact that it failed to allege an act prohibited by law. Specifically, Arnold contends that "defrauding" necessarily requires the wrongful acquisition of property, which was not alleged in the indictment. Arnold also argues that (1) the evidence presented at trial was insufficient to support the guilty verdict because the government failed to prove that he wrongfully acquired property, and (2) the jury instructions were improper because the district court's definition of fraud did not allege the wrongful acquisition of property.

"Whether an indictment sufficiently alleges a statutorily proscribed offense is a question of law that [this Court] review[s] de novo." United States v Steele, **[⊥ 3]** 178 F.3d 1230, 1233 (11th Cir. 1999). "In reviewing the sufficiency of the evidence, we view it de novo, but in the light most favorable to the government, and accepting all reasonable inferences which support the verdict in order to determine if there was substantial evidence from which a reasonable trier of fact could have concluded that the defendants were guilty beyond a reasonable doubt." United States v Adkinson, 158 F.3d 1147, 1150 ([11th Cir.] 1998) (citation omitted). Under Fed.R.Crim.P. 30, a challenge to jury instructions is preserved if the party objects to the instructions before the jury retires, stating distinctly the specific grounds for the objection. United States v Starke 62 F.3d 1374, 1380-81 (11th Cir. 1995). Where the defendant makes no specific objection to the

jury charge as read at trial, we review the claim for plain error. United States v Schlei, 122 F.3d 944, 973 (11th Cir. 1997).

Rule 12 provides that a motion alleging a defect in the indictment must be raised before trial or it is waived. Fed.R.Crim.P. 12(b)(2), (f) (2002). "An indictment is sufficient 'if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.'" Steele, 178 F.3d at 1233 (citation omitted). "In order to sustain a conviction under []1 § [⊥ 4] 371, the government must prove (1) the existence of an agreement to achieve an unlawful objective; (2) the defendants' knowing and voluntary participation in the agreement; and (3) the commission of an act in furtherance of the agreement." United States v Adkinson, 158 F.3d 1147, 1153 (1998) (citation omitted).

Because Arnold failed to raise this specific challenge to the indictment in the district court, he has waived this issue on appeal. Regardless, because a violation of § 371 does not require the wrongful acquisition of property, Arnold's claims with regard to the indictment, the sufficiency of the evidence, and the jury instructions are without merit.

Arnold also argues that the district court improperly ordered him to pay Fleming's taxes as a condition of his sentence and suggests that ordering both he and Fleming to pay these taxes results in double taxation and double jeopardy violations. Arnold also argues that the district court incorrectly calculated his offense level because it relied upon his taxes, which were not part of the charged offense. Arnold seems to argue that his sentence should have been determined by focusing solely on the taxes that

---

[1] As such in the original.

Fleming evaded. Arnold also argues that the district court improperly ignored his sentencing allocution that had been submitted by affidavit.

When, as here, a defendant fails to object in the district court, we review for [⊥ 5] plain error. See United States v Vonn, 535 U.S. 55, 59, 122 S.Ct. 1043, 1046, 152 L.Ed.2d 90 (2002). In order to establish plain error, a defendant must show that "there is (1) error, (2) that is 'plain' and (3) that 'affect[s] substantial rights." United States v Lejarde-Rada, 319 F.3d 1288, 1290 (11th Cir. 2003) (quoting United States v Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)). If all three conditions are met, we may exercise its [our] discretion to recognize a forfeited error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (quoting Johnson v United States, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)) (other internal quotations and citations omitted).

Under § 2T4.1(G), a defendant who is found guilty of tax evasion that results in tax loss in excess of $200,000 has a base offense level of 18. U.S.S.G. §§ 2T1.1, 2T4.1(G). Tax loss, for purposes of § 2T1.1, is "the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed.)" U.S.S.G. § 2T1.1(c)(1). The guidelines commentary directs a district court to "make a reasonable estimate based on the available facts." U.S.S.G. § 2T1.1, comment. (n.1). A district court may impose various conditions of supervised release if such conditions are reasonably related to, among other things, "the nature and circumstances of the offense and the [⊥ 6] history and characteristics of the defendant" and the need to deter future criminal conduct. U.S.S.G. § 5D1.3(b).

Because the district court's calculation of the estimated tax loss was a reasonable estimate of the tax loss during the time when Arnold was involved in the

conspiracy and was based upon calculations established from evidence presented at trial, the district court did not plainly err by determining his sentence. In addition, in light of the nature of the offense and Arnold's articulated beliefs regarding the unconstitutionality of the tax system, the condition of supervised release requiring him to cooperate with the IRS was not improper.

Joseph Evans

Evans argues that the indictment against him was void because the grand jury's term had expired at the time when it returned the indictment, and the district court's nunc pro tunc extension order was insufficient to restore jurisdiction. Evans claims that, because the grand jury's term expired on June 22, 2000, and his indictment was returned on June 27, 2000, it had no power to indict him.

We review issues of jurisdiction and statutory interpretation de novo. United States v Rendon, 354 F.3d 1320, 1324 (11th Cir. 2003) (citations omitted), cert. denied 124 S.Ct. 2110 (2004). Federal Rule of Criminal Procedure 6(g) provides that "[a] grand jury must serve until the court discharges it, but it may [⊥ 7] serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service." Fed.R.Crim.P. 6(g). Except as otherwise provided, an extension may not exceed 6 months. Id. "A nunc pro tunc order merely recites court actions previously taken but not properly or adequately recorded." Cypree Barn Inc. v. Western Elec. Co. Inc., 812 F.2d 1363, 1364 (11th Cir. 1987) (citation omitted). A district court cannot, however, correct its improper action by treating it as a clerical error. Id.

Because the district court merely was utilizing its nunc pro tunc order to correct a miscalculation of the dates in an earlier order extending the grand jury's term and was not seeking to correct an earlier action that was improper, the nunc pro tunc order was proper, and the

grand jury's term had not expired when it issued the indictment.

Evans next argues that the district court abused its discretion by allowing the government's introduction at trial of evidence of his non-filing of income taxes because (1) such prior bad act evidence was not related to the substantive offense and was significantly more prejudicial than probative, and (2) the government, by assuring him that the evidence only would be admitted if he took the stand, violated Fed.R.Evid. 404(b)'s notice requirements. Evans also argues that the district court permitted the government to admit highly prejudicial and irrelevant [⊥ 8] evidence, namely, Fleming's statements regarding the unconstitutionality of federal income tax and his lack of faith in the U.S. government, that had no relationship to Evans's participation in the conspiracy. Evans argues that Fleming's statements should not have been admitted because, under Fed[.]R.Evid. 801(d)(2)(e), statements by a non-testifying co-conspirator are not admissible unless the co-conspirator is unavailable to testify.

We review a district court's rulings on the admissibility of evidence for an abuse of discretion. United States v Jiminez, 224 F.3d 1243, 1249 (11th Cir. 2000). "An evidentiary ruling will stand unless the complaining party has shown a substantial prejudicial effect." United States v Breitweiser, 357 F.3d 1249, 1254 (11th Cir.) (citations and internal quotations omitted), cert. denied 124 S.Ct. 2829 (2004). Federal Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided" by law. Fed.R.Evid. 402. Evidence is intrinsic, and thus, admissible if it is "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." United States v McLean 138 F.3d 1398, 1403 (11th Cir. 1998). Even relevant

intrinsic evidence may be excluded, however, if, among other things, its probative value is substantially outweighed by the danger [⊥ 9] of unfair prejudice. Fed.R.Evid. 403.

Federal Rule of Evidence 404 provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). Extrinsic evidence may be admissible under Rule 404(b), however, if it is relevant to some issue other than a defendant's character, such as intent or motive. Id.; United States v Montes-Cardenas, 746 F.2d 771, 780 (11th Cir. 1984). We have developed a three-part test to determine whether evidence is admissible under Rule 404(b): (1) "the evidence must be relevant to an issue other than the defendant's character;" (2) "as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act;" and (3) "the evidence must possess probative value that is not substantially outweighed by its undue prejudice and meet the other requirements of Rule 403." Breitweiser, 357 F.3d at 1254. Determining whether the probative value of evidence is substantially outweighed by its prejudicial impact "lies within the sound discretion of the district judge." United States v Jernigan, 341 F.3d 1273, 1282 (11th Cir. 2003) (citation and internal quotations omitted).

Rule 404(b) requires that the prosecution provide notice to the defendant of its intention to present extrinsic act evidence at trial. United States v Carrasco, [⊥ 10] 381 F.3d 1237, 1240 (11th Cir. 2004) (citing Fed.R.Evid. 404(b) advisory committee's notes to 1991 amendments). The rule's notice requirement is intended "to reduce surprise and promote early resolution on the issue of admissibility." Id. at 1241.

Federal Rule of Evidence 801(d)(2)(E) provides that "statements of co-conspirators made during the course

and in furtherance of the conspiracy are not hearsay." United States v Hasner, 340 F.3d 1261, 1274 (11th Cir. 2003), cert. denied No. 03-1487 (U.S. Oct. 4, 2004). In order to admit evidence under Rule 801(d)(2)(E), the government must establish by a preponderance of the evidence that "(1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy." Id.

Because the extrinsic evidence was relevant to an issue other than Evans's character and the probative value of this evidence, along with that of the intrinsic evidence concerning Fleming, was not substantially outweighed by the risk of unfair prejudice, the district court did not abuse its discretion by overruling Evans's evidentiary objections.

Evans next argues that the evidence was insufficient to support his conviction because the government failed to offer any direct evidence that (1) an **[⊥ 11]** agreement existed between him and Fleming regarding Fleming's income taxes, or (2) Evans knowingly and voluntarily participated in the agreement. He contends that the evidence showed nothing more than that he wanted to help a member of his church and did so without receiving remuneration.

"In reviewing the sufficiency of the evidence, we view it de novo, but in the light most favorable to the government, and accepting all reasonable inferences which support the verdict in order to determine if there was substantial evidence from which a reasonable trier of fact could have concluded that the defendants were guilty beyond a reasonable doubt." Adkinson, 158 F.3d at 1150 (citation omitted).

Because there was substantial evidence from which a reasonable trier of fact could have concluded that Evans was guilty beyond a reasonable doubt, the district court

did not err by denying Evans's motion for judgment of acquittal.

Finally, Evans argues that the district court abused its discretion by failing to hold an evidentiary hearing after learning that the deputy clerk had interrupted the jury proceedings in order to administer final payments. Evans contends that jury tampering concerns involve the court's obligation to ensure that the integrity of the judicial process was not compromised by improper jury contact. According to Evans, the final payment impliedly and expressly communicated to the jury that he **[⊥ 12]** was guilty and that further deliberation was unnecessary.

When, as here, a defendant fails to object to an issue below, we review for plain error. See Vonn, 535 U.S. at 59, 122 S.Ct. at 1046.

"Where there are allegations of extraneous information, outside influence or other jury misconduct, the decision whether to investigate rests in the sound discretion of the district court." United States v Darby, 744 F.2d 1508, 1540 (11 Cir. 1984). We have held that, when alleged misconduct involved outside influences, a district court's duty to investigate arises only when the party alleging misconduct adequately shows that the outside influence overcomes the presumption of jury impartiality. Id. "In other words, there must be something more than mere speculation." Id.

Because the decision to investigate alleged jury interference lies within the sound discretion of the district court, and there was no showing below that the outside influence was sufficiently serious to overcome the presumption of jury impartiality, there was no plain error.

Upon review of the record, and upon consideration of the briefs of the parties, we find no reversible error. Accordingly, we affirm Evans's conviction and Arnold's conviction and sentence.

AFFIRMED.

2004 Nov 4 Fleming Opinion

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 04 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283
Non-Argument Calendar

D. C. Docket No. 00-00262-CR-J-20HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(NOVEMBER 4, 2004)

Before CARNES, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Donald Fleming appeals his conviction for conspiracy to defraud the United [⊥ 2] States, in violation of 18 U.S.C. § 371. Fleming pled guilty to this charge, representing himself during the plea proceedings.

On appeal, Fleming, now proceeding with counsel, argues that, although he (1) acknowledged that he

understood the constitutional rights that he would be waiving by entering a guilty plea, and (2) admitted to the facts alleged by the government in the plea agreement, he did not understand, due to the fact that he had no legal education and no working knowledge of the Sentencing Guidelines, that the district court would be able to enhance his sentence as a result of the facts set forth in the plea agreement. Fleming contends that, as such, his plea was not knowing and voluntary. Specifically, Fleming contends that, although the plea agreement stated that the government would not seek an enhancement pursuant to U.S.S.G. § 2T1.1, the district court did not explain that this provision merely addressed sophisticated concealment of the plan, and a layman, without a working knowledge of the Federal Rules of Evidence and the Sentencing Guidelines, would have understood that no upward adjustments were applicable. Fleming contends that a lawyer should have been appointed to explain the plea agreement and the guidelines.

When, as here, a defendant fails to object to a Fed.R.Crim.P. 11 violation, we review for plain error. See United States v Vonn, 535 U.S. 55, 59, 122 S.Ct. 1043, 1046, 152 L.Ed.2d 90 (2002). In order to establish plain error, a defendant **[⊥ 3]** must show that "there is (1) error, (2) that is 'plain' and (3) that 'affect[s] substantial rights.'" United States v Lejarde-Rada, 319 F.3d 1288, 1290 (11th Cir. 2003) (quoting United States v Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)). If all three conditions are met, we may exercise our discretion to recognize a forfeited error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Id. (quoting Johnson v United States, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)) (other internal quotations and citations omitted).

A court accepting a guilty plea must comply with Rule

11 and specifically address three "core principles" to ensure that a defendant (1) enters his guilty plea free from coercion, (2) understands the nature of the charges, and (3) understands the consequences of his plea. United States v Jones, 143 F.3d 1417, 1418-19 (11th Cir. 1998). In an attempt to ensure compliance with the third core concern, Rule 11(b)(1) provides a list of rights and other relevant matters, about which the court is required to inform the defendant prior to accepting a guilty plea. Fed.R.Crim.P. 11(b)(l). The Supreme Court recently held that a defendant seeking reversal of his conviction after a guilty plea on the basis of plain error under Rule 11 "must show a reasonable probability that, but for the error, he would not have entered the plea." United States v Dominguez Benitez – U.S. – [542 U.S. –], 124 S.Ct. 2333, 2340, 159 L.Ed.2d 157 (2004). **[⊥ 4]**

Before a defendant is allowed to waive the assistance of counsel, he "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his decision is made with eyes open.'" Faretta v California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (quoting Adams v United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)). "The ideal method of assuring that a waiver is valid is for the trial court to conduct a pretrial hearing at which the accused is informed of the charges, basic trial procedures, and hazards of self-representation." United States v Cash, 47 F.3d 1083, 1088 (11th Cir. 1995). The ultimate test for whether there has been a valid waiver of the right to counsel is the defendant's understanding. Id.

Upon review of the record and upon consideration of the briefs, we find no reversible error. The district court conducted a thorough hearing, pursuant to Faretta, 422 U.S. at 835, 95 S.Ct. at 2541, and therefore did not plainly err by determining that his un-counseled guilty plea was knowing and voluntary. Moreover, because Fleming's plea

was knowing and voluntary, the district court did not commit plain error by sentencing him, based upon his admissions during the plea colloquy. Accordingly, we affirm.

AFFIRMED.

Rule 14.1(i)(ii)—Additional Orders

Trial Court

2003 Apr 28 Final Judgment—Fleming

AO 245B (3/01 Rev. locally 9/01)
Sheet 1 - Judgment in a Criminal Case
FILED 2003 APR 28 P 4:19
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
DONALD C. FLEMING

CASE NO. 3:00-cr-262-J-20HTS
Defendant's Attorney:
James A. Hernandez, Esq. (cja)

THE DEFENDANT:

X pleaded guilty to Count One of the Indictment.

__ pleaded nolo contendere to count(s) which was accepted by the court.

__ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 U.S.C. 371	Conspiracy to defraud the United States Department of Treasury for the purpose of impeding or obstructing the Internal Revenue Service.	November 1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

__ The defendant has been found not guilty on count(s)

X Counts Two through Ten and Fifteen of the Indictment are dismissed pursuant to the Plea Agreement.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 077-34-4383
Defendant's Date of Birth: February 6, 1943
Date of Imposition of Sentence: April 28, 2003
Defendant's USM No.: 21483-018
Defendant's Mailing Address: 1012 Crestdale St., Jacksonville, FL 32211
Defendant's Residence Address: 1012 Crestdale St., Jacksonville, FL 32211

CERTIFIED A TRUE COPY
SHERYL L LOESCH. CLERK /s/ Harvey Schlesinger
U. S. DISTRICT COURT HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

By: /s/_____
Deputy Clerk DATE: April 28 2003
( ) COPIES DISTRIBUTED
SCANNED 1222

AO 245B (3/01 Rev. locally 9/01)
Sheet 2 – Imprisonment
Defendant: DONALD C. FLEMING Judgment-Page 2 of 6
Case No.: 3:00-cr-262-J-20HTS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **27 months**.

X The court makes the following recommendations to the Bureau of Prisons: an institution as close as possible to Jacksonville, Florida.

X The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.

_ at _ a.m./p.m. on

_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before 2 p.m. on

_ as notified by the United States Marshal.

_ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

___[blank]_____ _____

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By:_____

Deputy Marshal

AO 245B (3/01 Rev. locally 9/01)

Sheet 3 - Supervised Release

Defendant: DONALD C. FLEMING Judgment-Page 3 of 6

Case No.: 3:00-cr-262-J-20HTS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician,

and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

_ The defendant shall participate in the Home Detention program for a period of _. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation

Office's Sliding Scale for Substance Abuse Treatment Services.

_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

_ If deported by the Immigration and Naturalization Service, the Defendant shall not re-enter the United States unless allowed to do so legally.

_ Defendant shall provide the Probation Officer access to any requested financial information.

_ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

_ Defendant shall perform _ hours of community service as directed by the Probation Officer.

_ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

X Defendant shall agree to undertake payment of all taxes, interest, and penalties found to be lawfully owed and due to the Internal Revenue Service with regard to both personal income taxes and all taxes due and owing from the operation of the various businesses the defendant controlled for, among others, the years 1993, 1994, 1995, and 1996, and to cooperate with and provide to the Internal Revenue Service any documentation necessary for a correct computation of all taxes due and owing for those years, including, if necessary, the filing of amended tax returns for said years.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500 unless the fine or restitution is paid in full before the fifteenth day after the date of Judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	**$100.00**		

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:
_ The interest requirement is waived.
_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred until _. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.
_ The defendant shall make restitution to the following victims in the amounts listed below:
_ Restitution is ordered jointly and severally with:

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Totals:	$		

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall make nominal payments as

determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While on supervision the defendant shall adhere to a payment schedule as determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While on supervision the defendant shall make nominal payments as determined by the Probation Office.

__ The defendant is ordered to immediately pay this obligation in full.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U. S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. __X__ In full
   A. __X__ due immediately
   B. ___ on or before ___.

II. ___ In installments
   A. ___ monthly in installments of __$__ over a period of ___ months, to commence ___ days after date of this judgment.
   B. ___ in installments of __$__ over a period of ___ to commence ___ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. §3664(f)(3)(A): [blank]

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

___ The defendant shall forfeit the defendant's interest in the following property to the United States: [blank]

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due

during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

FILE COPY

Date Printed: 04/29/2003
Notice sent to:

√ A. William Mackie, Esq. and Troy Sellers
U.S. Attorney's Office
Middle District of Florida
300 N. Hogan Street, Suite 700
P.O. Box 600
Jacksonville, FL 32201

√ James A. Hernandez, Esq.
Hernandez & Hernandez
1905 Atlantic Blvd.
Jacksonville, FL 32207-3405

2003 Apr 28 Final Judgment—Arnold

AO 245B (3/01 Rev. locally 9/01)
Sheet 1 - Judgment in a Criminal Case
FILED 2003 MAY 28 A 11:31
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
WILLIAM ALLEN ARNOLD

CASE NO. 3:00-cr-262-J-20HTS
Defendant's Attorney: Pro Se

THE DEFENDANT:
__ pleaded guilty to Count .
__ pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on Count One of the Indictment after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 U.S.C. 371	Conspiracy to defraud the United States Department of Treasury for the purpose of impeding or obstructing the Internal Revenue Service.	November 1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

__ The defendant has been found not guilty on count(s)
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 256-70-3609
Defendant's Date of Birth: December 24, 1946
Date of Imposition of Sentence: May 28, 2003
Defendant's USM No.: 21415-018
Defendant's Mailing Address: 4342 Forest Rd,
Columbus, GA 31907

Defendant's Residence Address:4342 Forest Rd,
Columbus, GA 31907

CERTIFIED A TRUE COPY
SHERYL L LOESCH. CLERK /s/ Harvey Schlesinger
U. S. DISTRICT COURT HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

By: /s/
Deputy Clerk DATE: May 28 2003
1248

AO 245B (3/01 Rev. locally 9/01)
Sheet 2 – Imprisonment
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **12 months**.

__ The court makes the following recommendations to the Bureau of Prisons:

__ The defendant is remanded to the custody of the United States Marshal.
__ The defendant shall surrender to the United States Marshal for this district.
__ at __ a.m./p.m. on
__ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
X before 2 p.m. on **Friday, June 27, 2003**
__ as notified by the United States Marshal.
__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

___[blank]_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By:_____

Deputy Marshal

AO 245B (3/01 Rev. locally 9/01)
Sheet 3 - Supervised Release
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **two (2) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit

him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

__ The defendant shall participate in the Home Detention program for a period of __. During this time, defendant will remain at defendant's place of residence except for

employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

_ If deported by the Immigration and Naturalization Service, the Defendant shall not re-enter the United States unless allowed to do so legally.

_ Defendant shall provide the Probation Officer access to any requested financial information.

_ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

_ Defendant shall perform _ hours of community service as directed by the Probation Officer.

_ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

X Defendant shall cooperate with the Internal Revenue Service to pay all outstanding taxes, interest and penalties.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal

monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500 unless the fine or restitution is paid in full before the fifteenth day after the date of Judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	$100.00		

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

__ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

__ The interest requirement is waived.

__ The interest requirement is modified as follows:

RESTITUTION

__ The determination of restitution is deferred until __. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

__ The defendant shall make restitution to the following victims in the amounts listed below:

__ Restitution is ordered jointly and severally with:

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$		

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall make nominal payments as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While on supervision the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While on supervision the defendant shall make nominal payments as determined by the Probation Office.

_ The defendant is ordered to immediately pay this obligation in full.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution

ordered will be the same unless, pursuant to 18 U. S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

AO 245B (3/01 Rev. locally 9/01)
Sheet 5 Part B - Criminal Monetary Penalties
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 6 of 6

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. X In full
   A. X due immediately
   B. __ on or before ___.

II. __ In installments
   A. __ monthly in installments of $ over a period of __ months, to commence __ days after date of this judgment.
   B. __ in installments of $ over a period of __ to commence __ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. §3664(f)(3)(A): [blank]

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ The defendant shall forfeit the defendant's interest in the following property to the United States: [blank]

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

2003 Aug 11 — Order denying Arnold's motion for release pending appeal

FILED
2003 AUG 11
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA
v. **Case No.: 3:00-cr-262-J-20HTS**
WILLIAM ALLEN ARNOLD
_____/

ORDER

Before the Court is Defendant, William Allen Arnold's First Motion for Release Pending Appeal. (Doc. No. 1267, filed on June 30, 2003). This Court finds:

(1) that the Defendant is not likely to flee or to pose a danger to the safety of any other person or to the community if released;

(2) that the Defendant's appeal is for the purpose of delay;

(3) that the appeal does not raise a substantial question of law or fact that is likely to result in reversal of conviction, an order for a new trial of all counts on which imprisonment has been imposed, a sentence that does not include a term of imprisonment, or a reduced sentence.

Therefore, the Motion is **DENIED**.

DONE AND ENTERED at Jacksonville, Florida, this 8th day of August, 2003.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
William Allen Arnold, pro se
A. William Mackie, AUSA
Garry Randolph, Courtroom Deputy
Law Clerk

1295

Appellate Court

2003 Jun 24 **Order–Denying Flemings' appointed counsel's first motion to withdraw**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 24 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

The motion to withdraw as appointed counsel for Appellant, filed by attorney James A. Hernandez, is DENIED WITHOUT PREJUDICE TO RENEWAL subject to counsel['s] filing a motion to withdraw and brief in compliance with Anders v. California, 386 U.S. 738 (1967).

Appellant's request to proceed pro se is DENIED AS MOOT.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

2003 Jun 24 **Order–Denying Fleming's appointed counsel's second motion to withdraw**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 15 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS KAHN
FOR THE ELEVENTH CIRCUIT

No. 03-12283

District Court Docket No. 00-00262-CR-J-20-HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

ORDER

Counsel in this direct criminal appeal has moved to withdraw and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). An attorney who finds an appeal "wholly frivolous" and seeks to **[⊥ 2]** withdraw from further representation must nevertheless remain in "the role of an active advocate on behalf of his client." Anders, 386 U.S. at 744, 7 S.Ct. at 1400. Thus, counsel seeking to withdraw from

further representation based upon the belief that an appeal is wholly frivolous must accompany the motion to withdraw with a brief that "set[s] out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." United States v Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985) (emphasis in original). Counsel must conduct a "conscientious examination" of the entire record on appeal. Penson v Ohio, 488 U.S. 75, 80, 109 S.Ct. 346, 350, 102 L.Ed.2d 300 (1988). Counsel then must isolate the pages of the record relevant to those arguably meritorious points and cite relevant legal authority. United States v Edwards, 822 F.2d 1012, 1013 (11th Cir. 1987). We, after plenary review of the record, must determine independently whether the case is wholly frivolous. Anders, 386 U.S. at 744, 87 S.Ct. at 1400.

In his brief, counsel briefly relates some of the district court proceedings and discusses briefly the taking of Fleming's plea and why counsel believes there is no arguable issue related to the plea. Counsel mentions only in passing the fact that Fleming was proceeding pro se at the plea and does not discuss at all why **[⊥ 3]** there are no issues of arguable merit related to, among other things, Fleming's self-representation, the denial of Fleming's motion to suppress, and Fleming's sentence. This list of potential errors arises from a cursory review of the record and is not intended as exhaustive, but it does establish that counsel has not detailed all of the potential sources of error arising in the trial process that, "although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." See Blackwell, 767 F.2d at 1487-88. Furthermore, our review indicates that the transcripts of six hearings are missing from the record on appeal and the transcription of a seventh hearing is

incomplete. On this record, counsel, who does not appear to have been present at most of those hearings, cannot accurately state that he has conducted a conscientious examination of the entire record nor can we conduct the required plenary review.

Accordingly, we deny, without prejudice, counsel's motion to withdraw and direct him to supplement the record with complete transcriptions of:

(1) the August 15, 2000 hearing;
(2) the March 23, 2001 hearing;
(3) the March 27, 2001 hearing;
(4) the April 30, 2001 hearing; [⊥ 4]
(5) the May 24, 2002 hearing;
(6) the March 21, 2003 hearing; and
(7) the March 25, 2003 hearing.

Upon completion of the record, counsel may then submit a merits brief or renew his Anders motion with a conforming brief. Should counsel elect to renew his motion under Anders he is hereby DIRECTED to address all irregularities and potential errors that might arguably support reversal, isolating the pages of the record relevant to the issue and citing appropriate, relevant legal authority.

DENIED, WITHOUT PREJUDICE.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

2003 Oct 16 **Order–Denying without opinion Arnold's Release Pending Appeal**

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 14 2003
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12810-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM ALLEN ARNOLD,
JOSEPH WELBURN EVANS,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

Appellant Arnold's "(Fourth) Motion for Release Pending Appeal" is DENIED.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Federal Rules of Criminal Procedure

Rule 11. Pleas

(a) Alternatives.

(1) *In general.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal he shall be allowed to withdraw the plea.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable

sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for

the government and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

(1) *In general.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) *Acceptance of a plea agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a plea agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of plea agreement procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of pleas, plea discussions, and related statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government

which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

FED. R. CRIM. P. 11.

Rule 32. Sentence and Judgment

(a) In general; time for sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or

lengthened for good cause.

(b) Presentence investigation and report.

(1) *When made.* The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) *Presence of counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the presentence report.* The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) *Exclusions.* The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the

revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence.

(1) *Sentencing hearing.* At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of statements at sentencing hearing.* Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of sentence.* Before imposing sentence, the court must:

(A) verify that the defendant and defendant's

counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(4) *In camera proceedings.* The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements—made under subdivision (c)(3)(B), (C), (D), and (E)—by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) *Notification of right to appeal.* After imposing sentence in a case which has gone to trial on a plea of

not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

(1) *In general.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(e) Plea withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code [18 USCS §§2241 et seq.].

FED. R. CRIM. P. 32.

Title 18

Section 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Common-wealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or

district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2)(A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if—

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term "minor" means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Common-

wealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

18 U.S.C.S. § 13 (Law Co-op. Supp. 2003).

§ 3563. Conditions of probation

(a) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13), unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant;

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test

within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

8) for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994 [42 USCS § 14071(a)(3)]); and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a].

If the court has imposed and ordered execution of a fine

and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

18 U.S.C.S. § 3563(a) (Law Co-op. 2001).

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C.S. § 3663A (Law Co-op. 2001).

Title 28

§ 3002. Definitions

As used in this chapter:

(1) "Counsel for the United States" means—

(A) a United States attorney, an assistant United States attorney designated to act on behalf of the United States attorney, or an attorney with the United States Department of Justice or with a Federal agency who has litigation authority; and

(B) any private attorney authorized by contract made in accordance with section 3718 of title 31 to conduct litigation for collection of debts on behalf of the United States.

(2) "Court" means any court created by the Congress of the United States, excluding the United States Tax Court.

(3) "Debt" means—

(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or

(B) an amount that is owing to the United States on

account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States; and includes any amount owing to the United States for the benefit of an Indian tribe or individual Indian, but excludes any amount to which the United States is entitled under section 3011(a).

(4) "Debtor" means a person who is liable for a debt or against whom there is a claim for a debt.

(5) "Disposable earnings" means that part of earnings remaining after all deductions required by law have been withheld.

(6) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(7) "Garnishee" means a person (other than the debtor) who has, or is reasonably thought to have, possession, custody, or control of any property in which the debtor has a substantial nonexempt interest, including any obligation due the debtor or to become due the debtor, and against whom a garnishment under section 3104 or 3205 is issued by a court.

(8) "Judgment" means a judgment, order, or decree entered in favor of the United States in a court and arising from a civil or criminal proceeding regarding a debt.

(9) "Nonexempt disposable earnings" means 25 percent of disposable earnings, subject to section 303 of the Consumer Credit Protection Act.

(10) "Person" includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or. an Indian tribe.

(11) "Prejudgment remedy" means the remedy of attachment, receivership, garnishment, or sequestration authorized by this chapter to be granted before judgment on the merits of a claim for a debt.

(12) "Property" includes any present or future interest, whether legal or equitable, in real, personal (including choses in action), or mixed property, tangible or intangible, vested or contingent, wherever located and however held (including community property and property held in trust (including spendthrift and pension trusts)), but excludes—

(A) property held in trust by the United States for the benefit of an Indian tribe or individual Indian; and

(B) Indian lands subject to restrictions against alienation imposed by the United States.

(13) "Security agreement" means an agreement that creates or provides for a lien.

(14) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States.

(15) "United States" means—

(A) a Federal corporation;

(B) an agency, department, commission, board, or other entity of the United States; or

(C) an instrumentality of the United States.

(16) "United States marshal" means a United States

marshal, a deputy marshal, or an official of the United States Marshals Service designated under section 564.

28 U.S.C. § 3002 (2000).

Title 31

Section 321. General authority of the Secretary

> (d)(1) The Secretary of the Treasury may accept, hold, administer, and use gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of the Treasury. Gifts and bequests of money and the proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed on order of the Secretary of the Treasury. Property accepted under this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.
>
> (2) For purposes of the Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for the use of the United States.

31 U.S.C. § 321(d) (2000).

Section 5101. Decimal system

United States money is expressed in dollars, dimes tenths, cents or [hundredths], and mills or thousandths. A dime is a tenth of a dollar[;] a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar.

31 U.S.C. § 5101 (2000).

Rule 14.1(i)(vi)—Additional Essential Materials

Trial Court

2000 Jun 27 **Indictment (Counts One to Ten (of 19))**

FILED
00 JUN 27 PM 5:21
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA
v. Case No. 3:00-CR-262-J-20B
DONALD C. FLEMING
JOYCE L. FLEMING
WILLIAM ALLEN ARNOLD
MICHAEL J. BLOOMQUIST
JONATHAN W. BOSWORTH
KATHERINE F. DUNN
JOSEPH W. EVANS
PENNY MINGE KAMISH
ROBIN RUSSO a/k/a Robin Tibbetts
JEFFERY TIBBETTS a/k/a Geoffery Armstrong

[2]Ct. 1:	18 U.S.C. § 371
Cts. 2 -7:	26 U.S.C. § 7201, 18 U.S.C. § 2
Cts. 8-10	26 U.S.C. § 7203
Cts. 11-14	26 U.S.C. § 7206(1)
Cts. 15-19	18 U.S.C. § 1503, 18 U.S.C. § 2

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[2] Format modified from original. Counts originally listed on right side immediately under "Case No."

INDICTMENT

The Grand Jury charges:

COUNT ONE

A. THE CONSPIRACY CHARGE

Beginning in or about February 1986 continuing through in or about November 1999, at Jacksonville, Palm Coast and St. Augustine, in the Middle District of Florida; Phoenix, Arizona; Clackamas, Oregon; and elsewhere.

DONALD C. FLEMING
JOYCE L. FLEMING
WILLIAM ALLEN ARNOLD
MICHAEL J. BLOOMQUIST [⊥ 2]
JONATHAN W. BOSWORTH
KATHERINE F. DUNN
JOSEPH W EVANS
PENNY MINGE KAMISH
ROBIN RUSSO a/k/a Robin Tibbetts
JEFFERY TIBBETTS a/k/a Geoffery Armstrong

the defendants herein, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with other individuals both known and unknown to the Grand Jury, to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS), departments and agencies of the United States of America, for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes, to wit: personal income taxes of DONALD and JOYCE FLEMING and employment taxes associated with the operation of a radio broadcast business commonly known, among other names, as the Jacksonville Traffic Center, through deceit, craft, trickery and dishonest means.

B, TERMS AND DEFINITIONS

Persons

1. DONALD C FLEMING ("FLEMING") was a resident of Jacksonville, Florida, who controlled, operated and owned a radio broadcast business commonly known as the Jacksonville Traffic Center (the "TraffiCenter") which provided traffic reports to radio and television stations in the Jacksonville, Florida, metropolitan area. The TraffiCenter earned gross business income from payments by numerous businesses and persons for radio advertisements that were announced during the broadcast of traffic reports. **[⊥ 3]**

2. JOYCE L. FLEMING was a resident of Jacksonville, Florida, who controlled, operated and owned a business known as Joyce's Dolls that was engaged in the appraisal, purchase and sale of antique and collectable items, including dolls and toy figurines. JOYCE FLEMING and DONALD FLEMING were husband and wife.

3. WILLIAM ALLEN ARNOLD ("ARNOLD") was a resident of St. Augustine, Florida, who provided legal research services to individuals and businesses arid acted as a trustee for a number of FLEMING'S businesses.

4. MICHAEL J. BLOOMQUIST ("BLOOMQUIST") was a resident of Arizona who provided tax and trust advice services through a business known as Crown Enterprises that operated in Phoenix, Arizona. DONALD and JOYCE FLEMING named BLOOMQUIST as a trustee in connection with a number of business and personal trusts that he assisted the FLEMINGS in establishing in 1993 for the purpose of concealing and disguising their income and assets from the IRS.

5. JONATHAN W. BOSWORTH ("BOSWORTH") was a resident of Ponte Vedra Beach, Florida, who was employed by FLEMING through one or more of the radio broadcast business entities controlled and operated by

FLEMING in the late 1980's primarily as a salesman for radio broadcast advertisements. During 1997, BOSWORTH worked for Global in the same capacity. In 1998, BOSWORTH was the president of a company known as Media Information Group, Inc. (MIG) which purportedly bought the business known as the TraffiCenter in 1998 and thereafter continued to employ FLEMING in the operation of this business. Bosworth operated MIG in a manner that served to disguise and conceal FLEMING's income from the IRS. **[⊥ 4]**

6. KATHERINE F. DUNN ("DUNN") was a resident of Truckee, California, who acted as a trustee of Tarwa Enterprises, a tax trust company. DUNN acted as a trustee for two trusts known as "Chase Unlimited" and "Charles Homestead" that were created in 1995 by the FLEMINGS with the assistance of DUNN for the purpose of concealing and disguising from the IRS the FLEMINGS' jointly held assets and JOYCE FLEMING'S income

7. JOSEPH W. EVANS ("EVANS") was a resident of Jacksonville, Florida, who acted as the President and Registered Agent of Sharuco Management Limited Co. ("Sharuco"). Sharuco was formed for the purpose of concealing and disguising FLEMING'S income and assets from the IRS.

8. PENNY MINGE KAMISH ("KAMISH") was a resident of Atlantic Beach, Florida, who was employed by FLEMING through one or more of the radio broadcast business entities controlled and operated by him from 1989 through 1998, including the TraffiCenter. KAMISH acted on behalf of FLEMING in a variety of capacities, including as office manager, salesperson, operations manager and radio broadcaster. During 1998, KAMISH also acted as the Vice President of MIG. Kamish used her position with the TraffiCenter and MIG to assist the FLEMINGS in various ways to conceal and disguise their income and assets from the IRS.

9. ROBIN RUSSO, a/k/a Robin Tibbetts ("RUSSO"), was a resident of Flagler Beach, Florida. RUSSO provided legal research services for various individuals under the name "Ambassador," RUSSO also conducted business related activities under the name the "Embassy of Yahweh" and the "Palm Coast Group" and acted as an editor for the "Sunset Isles Newsletter" which published information on various business and tax related subjects, including "Trusts."

10. JEFFERY TIBBETTS, a/k/a Geoffery Armstrong ("TIBBETTS"), was a resident [⊥ 5] of Flagler Beach, Florida. TIBBETTS provided legal research services for various individuals under the name "Ambassador." TIBBETTS also conducted business related activities under the name the "Embassy of Yahweh" and the "Palm Coast Group."

Entities

11. Jacksonville Traffic Center (also known as the "TraffiCenter") was a radio broadcast business controlled, operated and owned by FLEMING which provided traffic reports to radio and television stations in the Jacksonville, Florida metropolitan area. The TraffiCenter earned gross business income from payments by numerous businesses and persons for radio advertisements announced during the broadcast traffic reports. The radio broadcast business known as the TraffiCenter operated from 1983 through 1998 under a number of different names at various periods of time, including the Jacksonville Broadcast Network; Jacksonville Radio Network; Jacksonville Traffic Center; Fleming Electronics; AAA Enterprises; Info Distribution; First Coast Trafficenter; and Info Gathering,

12. Joyce's Dolls was a business controlled, operated and owned by JOYCE FLEMING that was engaged in the appraisal, purchase and sale of antique and collectable items, including dolls, toy figures and related items. This

business operated under a number of different names at various periods of time including Pot Pusher; Joyce's Dolls and Things; Joyce's Dolls & Stuff; Chase Unlimited; and B&S Enterprises.

13. Avalon Business Consultancy, Ltd. ("Avalon") was a Florida limited partnership formed in 1996 by ARNOLD and James Bramble. The primary business purpose of Avalon was to provide consulting services to businesses.

14, Jimal Enterprises, Ltd. ("Jimal") was a Florida limited partnership formed in 1996 **[⊥ 6]** by ARNOLD and James Bramble. ARNOLD served as a Limited Partner and James Bramble as a General Partner of Jimal. The primary business purpose of Jimal was to purchase Info Distribution and AAA Enterprises from FLEMING.

15. Global Broadcasting, Ltd. ("Global") was a Florida limited partnership formed in 1997 by EVANS with Sharuco Management Limited, Co. as the General Partner of Global and Yakita Investments as the Limited partner. EVANS served as the Registered Agent of Sharuco. Global employed BOSWORTH as a salesman in connection with radio broadcast advertisements. The primary purpose of Global was to buy Info Distribution and AAA Enterprises from Jimal.

16. Sharuco Management Limited Co. ("Sharuco") was a foreign limited partnership formed in 1997 in Nevis, British West Indies. The president of Sharuco was EVANS. The primary business purpose of Sharuco, the General Partner of Global, was to form Global.

17. Media Information Group, Inc. ("MIG") was a Florida corporation formed in 1998 by KAMISH and BOSWORTH. BOSWORTH was the President of MIG and KAMISH was the Vice President. The primary business and purpose of MIG was to buy the radio broadcast business known as the TraffiCenter which had been previously purchased in 1997 by Global from Jimal.

18. "Warehouse Bank" refers to a deceptive banking

scheme wherein a person establishes a single bank account at a legitimate financial institution under a given name for the purpose of permitting numerous individuals, or "clients," to use that bank account for their personal and business use. Participating clients deposit funds in the Warehouse Bank account and direct the operator to pay their expenses using the Warehouse Bank account checks. The operator of the Warehouse Bank account offers anonymity to individual clients who use the [⊥ 7] Warehouse Bank to process their banking transactions so that the clients can use the Warehouse Bank to engage in financial transactions (e.g., depositing funds and paying expenses) without creating any banking records that reveal their identity. Further, the operator of the Warehouse Bank attempts to protect the identity of account clients by maintaining encoded records relating to individual accounts and periodically destroying records in order to assist in concealing the identity of individuals utilizing the Warehouse Bank services.

19. An Unincorporated Business Organization (UBO) is a type of business trust designed to create the appearance that the UBO, not the person who created the UBO, is the owner of record of such assets, property or income that is actually controlled, owned or received by the person who formed the UBO.

20. The Internal Revenue Service ("IRS") is an agency of the United States within the Department of Treasury that is responsible for administering and enforcing the tax laws of the United Sates and collecting taxes owed to the Treasury of the United States by its citizens and other various entities.

21. "Income tax" refers to the tax imposed on the income of, among others, every individual who is a United States citizen. The law requires every individual whose income meets or exceeds certain minimal amounts to file a federal income tax return and pay the federal income tax due for each year.

22. "Employment taxes" refers to taxes that an employer is required to deduct from the wages due an employee including withholding and social security contributions under to the Federal Insurance Contribution Act (FICA) and pay to the United States unemployment compensation on behalf of each employee under to the Federal Unemployment Tax Act (FUTA). [⊥ 8]

C. MANNER AND MEANS

1. It was part of the unlawful conspiracy that DONALD C. FLEMING (a) operated various businesses as sole proprietorships under numerous business names; (b) avoided the creation of bank deposit records by the extensive practice of cashing business income checks; (c) paid radio broadcast business employees in such a manner as to evade employment taxes; (d) used third parties to act as nominees in the conduct of his business; (e) created nominee trust entities; (f) participated in a Warehouse Banking scheme to conceal income and expenses; (g) operated foreign banks accounts under third parry names; (h) caused receipts to be paid to him through and in the name of others; and (i) established foreign limited liability companies in a Carribean[3] island country with banking and ownership secrecy laws as part of a scheme to conceal business and personal income and assets from detection by the IRS.

2. It was part of the unlawful conspiracy that JOYCE L. FLEMING (a) operated various businesses as sole proprietorships under numerous business names; (b) employed third parties to act as nominees in the conduct of her business; (c) created nominee trust entities; (d) participated in a Warehouse Banking scheme to conceal income and expenses; (e) operated foreign banks accounts under third party names; (f) caused receipts to be paid to her through and in the name of others; and (g) established

[3] As such in the original.

foreign limited liability companies in a Carribean[3] island country with banking and ownership secrecy laws as part of a scheme to conceal business and personal income and assets from detection by the IRS.

3. It was further part of the conspiracy that FLEMING used and attempted to use false social security numbers or other identifying information and filed false bank and public documents in an effort to conceal income or financial transactions from detection from the IRS.
[⊥ 9]

4. It was further part of the conspiracy that DONALD and JOYCE FLEMING retained complete control and ownership of their respective business interests, and control of all related business and personal assets and income, while employing deceptive means to conceal such facts from the IRS by means of nominees, sham business and financial transactions and the creation of other business entities to create the appearance that the ownership and control of said businesses were held by other parties.

5. It was further part of the conspiracy that FLEMING controlled, owned and operated a communications broadcast business in the Jacksonville, Florida, under various names including the Jacksonville Broadcast Network; Jacksonville Radio Network; Jacksonville Traffic Center; Jacksonville TraffiCenter; Fleming Electronics; AAA Enterprises; Info Distribution; First Coast TraffiCenter; and Info Gathering, which was virtually the exclusive source for broadcast traffic reports to radio and television stations in the metropolitan area and from which he earned millions of dollars in gross business income through the collection of payments from business clients for broadcast commercial advertisements all the while concealing the entire amount of the gross business income from the IRS from at least 1986 through 1998.

6. It was further part of the conspiracy that

FLEMING (a) controlled his radio broadcast business in such a manner that the employees, including the radio and television broadcast announcers, were paid, or caused to be paid, by either cash, checks issued by through a Warehouse Bank scheme or checks issued on bank accounts listed under nominee names in an effort to disguise the true nature of the employment status of said employees; (b) failed to maintain and submit proper documents or records to the IRS as required under the law which reported any funds paid to said employees; and (c) failed to withhold either any federal income [⊥ 10] or employment taxes from payments made to business employees.

7. It was further part of the conspiracy that DONALD and JOYCE FLEMING (a) created numerous nominee trusts with the aid and assistance of BLOOMQUIST for the purpose of concealing and disguising from the IRS the true ownership and control of income and assets of the FLEMINGS, and (b) filed false and sham liens in public records on one or more of said trusts for the purpose of impeding and obstructing the lawful functions of the IRS in the ascertainment, assessment and collection of any federal income taxes that might be due and owing by the FLEMINGS.

8. It was further part of the conspiracy that FLEMING endeavored to transfer various businesses and related assets he controlled and owned to third parties in a manner designed to conceal and disguise the true nature of the transactions from the IRS by means of nominees and sham transactions with the aid and assistance of ARNOLD in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

9. It was further part of the conspiracy that DONALD and JOYCE FLEMING formed and operated various unincorporated business organizations (UBOs) with the aid and assistance of DUNN, KAMISH and

others both known and unknown to the grand jury for the purpose of concealing and disguising the true control and ownership of the FLEMINGS' business income and assets in order to impede and obstruct the lawful tax assessment and collection functions of the IRS

10. It was further part of the conspiracy that DONALD and JOYCE FLEMING (a) formed a foreign limited liability corporation known as Consolidated Systems, LLC in the country of Nevis, British West Indies and (b) established a foreign bank account with the Bank [⊥ 11] of Nevis using nominee names with the aid and assistance of RUSSO, TIBBETTS and other individuals both known and unknown to the grand jury for the purpose of transferring income and assets out of the United States in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

11. It was further part of the conspiracy that ARNOLD formed or caused to be formed a limited partnership known as Jimal in order to buy the TraffiCenter, which continued to be controlled and owned by FLEMING, for the purpose of concealing and disguising the true income and assets of FLEMING in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

12. It was further part of the conspiracy that EVANS formed or caused to be formed a limited partnership known as Global in order to buy the TraffiCenter, which continued to be controlled and owned by FLEMING, for the purpose of concealing and disguising the true income and assets of FLEMING in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

13. It was further part of the conspiracy that KAMISH and BOSWORTH formed, or caused to be formed, a corporation known as Media Information Group (MIG) to buy the TraffiCenter, which was owned and controlled by FLEMING, for the purpose of concealing and disguising

the true income and assets of FLEMING in order to impede and obstruct the lawful tax assessment and collection functions of the IRS.

14. It was further part of the conspiracy that DONALD and JOYCE FLEMING failed to file federal individual, corporate, trust or partnership income tax returns in order to impede and obstruct the lawful tax assessment and collection functions of the IRS. [⊥ 12]

D. OVERT ACTS

In furtherance of the conspiracy and to achieve the objects thereof, the defendants and their co-conspirators, known and unknown to the Grand Jury, committed and caused to be committed the following overt acts in the Middle District of Florida and elsewhere:

1. In or about February 1986, FLEMING mailed a cashier's check for $8,321 to the National Commodity and Barter Association requesting a "Mutual Assistance Plan" together with attached copies of letters he had received from the IRS.

2. In or about March 1993, DONALD and JOYCE FLEMING signed an National Commodity Exchange contract which stated: "I Don +Joyce Fleming do hereby appoint CHRISTIAN PATRIOT ASSOCIATION as my agent for the purpose of holding FRNS [Federal Reserve Notes] and obtaining for me on my behalf gold and/or silver coins and/or bullion.

3. In or about May 1993, BLOOMQUIST, acting through Crown Enterprises, sent DONALD FLEMING correspondence relating to the formation of trusts with a descriptive map of the trusts and a total proposed cost for the trust package of $3,750.

4. In or about June 1993, BLOOMQUIST assisted the FLEMINGS in creating the following trusts: Serendipity Trust, Ferdinand Trust, Home Allowance Trust, Safe Holding Trust, Travel One Trust, Travel Two Trust, Travel Three Trust, Travel Four Trust, Property One

Trust, Property Two Trust, Property Three Trust, Mobile One Trust, Mobile Two Trust, RV One Trust, AAA Enterprises, B&S Enterprises, Info.[4] Distribution, and Info Trust.

5. In or about June 1993, FLEMING purchased silver from Viking International Trading with money orders totaling $1,800, and instructed shipment to a New York address.

6. In or about August 1993, FLEMING signed and KAMISH notarized a Bill of Sale **[⊥ 13]** for Fleming Electronics to Safeholding[5] Trust for $100; Jacksonville TraffiCenter to Info Trust for $100; and the physical assets of Jacksonville Radio Network to Safe Holding Trust for $100. JOYCE FLEMING signed and KAMISH notarized a Bill of Sale for her "Antique Collection" to Serendipity Trust for $100; and the physical assets of Joyce's Dolls and Stuff to the Ferdinand Trust for $100. The FLEMINGS both signed a Bill of Sale, notarized by KAMISH, for all of their personal household items, furniture and supplies located at 1012 Crestdale Street to Mobile Two Trust for $100.

7. In or about August 1993, BLOOMQUIST filed a $250,000 lien on Info Trust.

8. In or about July 1994, BLOOMQUIST signed as lienor/trustee a Notice of Common Law Lien and Writ of Attachment for personal property on behalf of the following trusts: Safe Holding Trust in the amount of $350,000; Info Trust in the amount of $250,000; Serendipity Trust in the amount of $500,000; Ferdinand Trust in the amount of $100,000; Travel One Trust in the amount of $15,000; Home Allowance Trust in the amount of $85,000; R/V[6] One Trust in the amount of $5,000; and Travel Three Trust in the amount of $4,000.

9. In or about October 1994, RUSSO and TIBBETTS

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[4] As such in the original.

[5] As such in the original.

[6] As such in the original.

acting under the title "Ambassadors" sent FLEMING a letter addressed to the IRS concerning IRS agents Andre Noisette and Cherie Thomas, together with a copy of Internal Revenue Code Section 7214 and an invoice for $200.

10. In or about September 1995, FLEMING signed and ARNOLD notarized a Notice of Judicial Location By Affidavit which stated; "...this Citizen does not reside inside the US ... nor in the District of Columbia..... Government officials and their agents do not have Affiant's consent to assert and impose foreign jurisdiction for enforcement of summons and jurisdiction of **[⊥ 14]** courts for the purpose of Title 26 USC, as well as for other national schemes and agendas ...."

11. In or about September 1995, Fleming drafted a letter to DUNN and another individual regarding the formation of three UBO's and DUNN signed a Trustee Service Agreement relating to services to be provided to DONALD and JOYCE FLEMING indicating that annual fees of $1250[7] would be required pertaining to UBO contracts.

12. In or about October 1995, a third party acting under the direction of FLEMING directed a Jacksonville, Florida attorney to arrange the sale of B&S Enterprises to Chase Unlimited Trust for 140 gold coins and to appoint JOYCE FLEMING as the manager of Chase Unlimited Trust for a period of one year.

13. In or about October 1995, Charles Homestead Trust was formed by DUNN; DONALD and JOYCE FLEMING transferred property to Charles Homestead Trust and DUNN was appointed trustee. KAMISH notarized the documents relating to Charles Homestead Trust.

14. In or about October 1995, Chase Unlimited Trust was formed by DUNN, who was appointed as trustee, and

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[7] As such in the original.

JOYCE FLEMING transferred property to Chase Unlimited Trust.

15. In or about October 1995, an Asset Purchase Agreement was signed by DUNN as purchaser and BLOOMQUIST as seller regarding Chase Unlimited Trust.

16. On or about November 17, 1995, DONALD and JOYCE FLEMING caused the formation of Consolidated Systems, LLC in Nevis, British West Indies, with the assistance of TIBBETTS and RUSSO.

17. In or about December 1995, FLEMING purchased $39,530 worth of precious metals from Swiss America Trading Corporation.

18. In or about January 1996, BLOOMQUIST as trustee for Home Allowance Trust **[⊥ 15]** signed a deed conveying real estate in Florida to DUNN as trustee for Charles Homestead Trust.

19. In or about February 1996, FLEMING separately purchased $20,580;[8] $41,625;[8] and $12,318.75 worth of precious metals from Swiss America Trading Corporation.

20. In or about August 1996, TIBBETTS and RUSSO sent FLEMING a letter referencing several letters to be sent by FLEMING to Senatorial arid Congressional representatives which stated in part "(T)he other 2 letters are to the congressman in your area along with paper 'Uncertainty of Federal Tax Laws' which helps eliminate willfulness ...."

21. In or about September 1997, ARNOLD signed a contract transferring Jimal's interest in Jacksonville Broadcast Network, Jacksonville Radio Network. Jacksonville Traffic Center, Jacksonville TraffiCenter, AAA Enterprises, Info Distribution, or Info Gathering to Global. Global issued a check in the amount of $52,080.47 to Jimal for the purchase price.

22. In or about February 1998, DONALD and JOYCE

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[8] As such in the original.

FLEMING deeded their personal residence over to the Goshen Covenant Church, of which EVANS was the pastor.

23. During the period from in or about July 1998 through on or about December 14, 1998, Global issued checks made payable to cash to FLEMING drawn on Global's SouthTrust[9] bank account[10]

24. During the period from in or about November 1997 through on or about July, 1998, EVANS cashed numerous checks from Global made payable to cash.

25. During the period from in or about September, 1998, through in or about October, 1998, FLEMING, KAMISH, and BOSWORTH, with others both known and unknown to the grand jury, met to discuss the transfer of Global's assets to MIG.

26. During the period from in or about October 1998, through on or about April 27, **[⊥ 16]** 1999, FLEMING provided services to MIG for which he was paid by MIG.

27. On or about January 5, 1999, MIG wrote a check made payable to cash for FLEMING's services and BOSWORTH cashed the check for FLEMING.

28. On or about February 19, 1999, BOSWORTH falsely told a special agent of the IRS that Forms 1099 had been submitted to the IRS for FLEMING and that backup tax withholding had been made for payments by MIG to FLEMING.

29. On several occasions from on or about September 28, 1999, through on or about November 20, 1999, FLEMING withdrew cash from Global's NationsBank bank account from automatic teller machines located in Jacksonville, Florida.

All in violation of Title 18, United States Code, Section 371.

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[9] As such in the original.

[10] As such in the original.

COUNT TWO

That during the calender[11] year 1993, in Jacksonville, Florida, Middle District of Florida and elsewhere,

DONALD C. FLEMING
MICHAEL J. BLOOMQUIST

defendants herein, did perform the following acts:

DONALD C. FLEMING did willfully attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1993 by failing to make an income tax return on or before April 15, 1994, as required by law to any proper officer of the Internal Revenue Service (IRS), by failing to pay to the IRS said income tax and by engaging in affirmative acts of evasion including but not limited to, dealing substantially in cash, using a mail drop to receive business receipts, concealing and attempting to conceal from the IRS the nature, source and extent of his income, structuring transactions to **[⊥ 17]** avoid detection of income and location of assets by the government, using nominees, submitting false documents to the Internal Revenue Service on or about August 26, 1997, and using the services of a Warehouse Bank.

MICHAEL BLOOMQUIST did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for calendar year 1993 by engaging in conduct, including but not limited to, counseling, advising, aiding and assisting defendant DONALD C. FLEMING to form and utilize the following trusts: Serendipity Trust, Ferdinand Trust, Home Allowance Trust, Safe Holding Trust, Travel One Trust, Travel Two Trust, Travel Three Trust, Travel Four Trust, Property One Trust, Property Two Trust, Property Three

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[11] As such in the original.

Trust, Mobile One Trust, Mobile Two Trust, RV One Trust, AAA Enterprises, B&S Enterprises, and Info.[4] Distribution; by being named trustee for AAA Enterprises; and by making false statements to a special agent of the IRS on or about May 17, 1995, regarding InfoDistribution.[12]

In violation of Title 26, United States Code, Section 7201, and Title 18, United States Code, Section 2.

COUNT THREE

That during the calender[11] year 1994, in Jacksonville, Florida, Middle District of Florida and elsewhere,

DONALD C. FLEMING
MICHAEL J. BLOOMQUIST

defendants herein did perform the following acts:

DONALD C. FLEMING did willfully attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar **[⊥ 18]** year 1994 by failing to make an income tax return on or before April 17, 1995, as required by law to any proper officer of the Internal Revenue Service (IRS), by failing to pay to the IRS said income tax and by engaging in affirmative acts of evasion including, but not limited to, dealing substantially in cash, using a mail drop to receive business receipts, concealing and attempting to conceal from the IRS the nature, source and extent of his income, structuring transactions to avoid detection of income and location of assets by the government, using nominees, and using the services of a Warehouse Bank.

MICHAEL J. BLOOMQUIST did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for calendar year 1994, by

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[12] As such in the original.

engaging in conduct, including but not limited to, signing as lienor/trustee a Notice of Common Law Lien and Writ of Attachment for Personal Property on behalf of Safe Holding Trust, Info Trust, Serendipity Trust, Ferdinand Trust, Travel One Trust, Travel Two Trust, Home Allowance Trust, RV Trust, Travel Three Trust; and by filing or causing to be filed Notice of Common Law Lien and Writ of Attachment in Duval County on behalf of Safe Holding Trust, Info Trust, Serendipity Trust, Ferdinand Trust, Travel One Trust, Travel Two Trust, Home Allowance Trust, RV Trust, and Travel Three Trust; and by making false statements to a special agent of the IRS on or about May 17, 1995, regarding InfoDistribution.[12]

In violation of Title 26, United States Code, Section 7201, and Title 18 United States Code Section 2. **[⊥ 19]**

COUNT FOUR

That during the calender[11] year 1995, in Jacksonville, Florida, Middle District of Florida and elsewhere,

DONALD C. FLEMING
MICHAEL J. BLOOMQUIST
KATHERINE F. DUNN
ROBIN RUSSO a\k\a Robin Tibbetts
JEFFREY TIBBETTS a\k\a Geoffery Armstrong

defendants herein did perform the following acts:

DONALD C. FLEMING did willfully attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1995 by failing to make an income tax return on or before April 15, 1996, as required by law to any proper officer of the Internal Revenue Service (IRS), by failing to pay to the IRS said income tax and by engaging in affirmative acts of evasion including, but not limited to, dealing substantially in cash, using a mail drop to receive business receipts, concealing and attempting to conceal from the IRS the nature, source and extent of his

income, structuring transactions to avoid detection of income and location of assets by the government, utilizing bank accounts in the name of trusts over which he exercised control, using the services of a foreign bank and using the services of a Warehouse Bank.

MICHAEL J. BLOOMQUIST did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1995, by engaging in conduct, including, but not limited to, acting as a nominee for DONALD C. **[⊥ 20]** FLEMING; signing Forms W9 for Info Distribution; signing Forms W9 for AAA Enterprises; corresponding with clients of Info Distribution anchor AAA Enterprises regarding federal income tax withholding issues; and by making false statements to a special agent of the IRS on or about May 17, 1995, regarding InfoDistribution.[12]

KATHERINE E. DUNN did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States for the calendar year 1995, by engaging in conduct, including but not limited to, forming or causing to be formed a UBO known as the Charles Homestead Trust and being named trustee for the Charles Homestead Trust.

JEFFREY TIBBETTS, a\k\a Geoffrey Armstrong, and ROBIN RUSSO, a\k\a Robin Tibbetts, did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1995, by forming or causing to be formed Consolidated Systems LLC.

In violation of Title 26, United States Code, Section 7201, and Title 18 United States Code Section 2. **[⊥ 21]**

COUNT FIVE

That during the calender[11] year 1996, in Jacksonville, Middle District of Florida and elsewhere,

DONALD C. FLEMING
WILLIAM ALLEN ARNOLD
MICHAEL J. BLOOMQUIST
KATHERINE E, DUNN

defendants herein did perform the following acts:

DONALD C. FLEMING did willfully attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1996 by failing to make an income tax return on or before April 5, 1997, as required by law to any proper officer of the Internal Revenue Service (IRS), by failing to pay to the IRS said income tax and by engaging in affirmative acts of evasion including, but not limited to, dealing substantially in cash, using a mail drop to receive business receipts, concealing and attempting to conceal from the IRS the nature, source and extent of his income, structuring transactions to avoid detection of income and location of assets by the government, utilizing bank accounts in the name of trusts over which he exercised control, and using the services of a Warehouse Bank.

MICHAEL J. BLOOMQUIST did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1996, by engaging in conduct, including, but not limited to, signing a deed, as trustee, for Home Allowance Trust; conveying property held by Home Allowance Trust to KATHERINE E. DUNN; signing Satisfactions of Common Law Lien, Writ of Attachment for Home Allowance Trust and Property One Trust; and preparing or causing to be prepared documents appointing **[J. 22]** ARNOLD as

trustee for AAA Enterprises arid Info Distribution Trust.

WILLIAM ALLEN ARNOLD did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States of America for the calendar year 1996, by engaging in conduct, including, but not limited to, serving as trustee for AAA Enterprises Trust and Info Distribution Trust; being a signatory on bank accounts at First Union National Bank for AAA Enterprises and Info Distribution; negotiating with third parties to sell the TraffiCenter; signing renewal applications to the FCC as trustee; and forming JIMAL,[13] a limited partnership, to buy and take title to AAA Enterprises and Info Distribution.

KATHERINE E. DUNN did procure, induce, command, counsel, abet, or aid, DONALD C. FLEMING in an attempt to evade and defeat a large part of the substantial income tax due and owing by him to the United States for the calendar year 1996 by taking title, as trustee for Charles Homestead Trust, to assets held by Home Allowance Trust,

In violation of Title 26, United States Code, Section 7201, and Title 18 United States Code, Section 2.

COUNT SIX

That during the calender[11] year 1993 and continuing through in or about December 31, 1996, in Jacksonville, Florida, Middle District of Florida and elsewhere,

DONALD C. FLEMING

the defendant herein, operated and conducted a commercial radio communications broadcast business under various names including, but not limited to, the Jacksonville Broadcast Network, Jacksonville Radio Network, Jacksonville Traffic Center, Jacksonville

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[13] As such in the original.

TraffiCenter AAA [⊥ 23] Enterprises, Info Distribution, and Info Gathering, and did willfully attempt to evade and defeat the payment of a large part of the Federal Unemployment Tax Act (FUTA) taxes due and owing to the United States of America by failing to file or submit an Employer's Annual Federal Unemployment Tax Return (Form 940) on or before the following dates:

YEAR	FUTA FORM 940 DATE
1993	January 31, 1994
1994	January 31, 1995
1995	January 31, 1996
1996	January 31, 1997

as required by law, to any proper officer of the IRS, by failing to pay to the IRS said employment tax, and by engaging in affirmative acts of evasion including, but not limited, paying his employees in cash, concealing and attempting to conceal from the IRS the nature, source and extent of his businesses income, structuring transactions to avoid detection of income and location of assets, using nominees, and using the services of a Warehouse Bank, whereas, as he then and there well knew and believed, there was due and owing to the United States of America substantial federal unemployment taxes.

In violation of Title 26, United States Code Section, 7201.

COUNT SEVEN

That during the calender[11] year 1993 and continuing through in or about December 31, 1996, in Jacksonville, Florida, Middle District of Florida and elsewhere, DONALD C. FLEMING the defendant herein, operated and conducted a commercial radio communications broadcast business under various names including, but not limited to, the Jacksonville Broadcast Network, [⊥ 24] Jacksonville Radio Network, Jacksonville Traffic Center, Jacksonville TraffiCenter, AAA Enterprises, Info

Distribution, and Info Gathering, and did willfully attempt to evade and defeat the payment of a large part of the Federal Insurance Tax Act (FICA) taxes due and owing to the United States of America by failing to file or submit an Employer's Quarterly Federal Tax Return (Form 941) on or before the following dates:

TAX DATES

April 30, 1993	January 31, 1995	October 31, 1996
August 2, 1993	May 1, 1995	January 21, 1997
November 1, 1993	July 31, 1995	
January 31, 1994	October 31, 1995	
May 2, 1994	January 31, 1996	
August 1, 1994	April 30, 1996	
October 31, 1994	July 31, 1996	

as required by law, to any proper officer of the IRS, by failing to pay to the IRS said employment tax, and by engaging in affirmative acts of evasion including, but not limited, to dealing substantially in cash and using "Associate Agreements," nominees, and the services of a Warehouse Bank to pay his employees, whereas, as he then and there well knew and believed, the total wages subject to withholding paid to employees for said quarters was such that there were due and owing to the United States of America substantial federal employment taxes.

In violation of Title 26, United States Code Section, 7201.

COUNT EIGHT

That during the calender[11] year 1994 in Jacksonville, Florida, in the Middle District of Florida and elsewhere,

DONALD C. FLEMING

who was a resident of Jacksonville, Florida and who received gross income excess of $600,000; **[⊥ 25]** that by reason of such gross income he was required by law, following the close of the calendar year 1994, and on or

before April 17, 1995, to make an income tax return to the District Director of the Internal Revenue Service (IRS) for the Internal Revenue District of North Florida, at Jacksonville, Florida, or to the Director, IRS Center, at Atlanta, Georgia, in the Northern District of Georgia, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, did willfully fail to make an income tax return to said District Director of the IRS, or to said Director of the IRS Center, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

COUNT NINE

That during the calender[11] year 1995 in Jacksonville, Florida, in the Middle District of Florida and elsewhere,

DONALD C. FLEMING

who was a resident of Jacksonville, Florida had and received gross income in excess of $550,000; that by reason of such gross income he was required by law, following the close of the calendar year 1995, and on or before April 15, 1996, to make an income tax return to the District Director of the Internal Revenue Service (IRS) for the Internal Revenue District of North Florida, Jacksonville, Florida, or to the Director, IRS Center, at Atlanta, Georgia, in the Northern District of Georgia, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, he did willfully fail to make an income tax return to said District Director of the IRS, or to said Director of the IRS Center, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203. **[⊥ 26]**

COUNT TEN

That during the calender[11] year 1996 in Jacksonville, Florida, in the Middle District of Florida and elsewhere,

DONALD C. FLEMING

who was a resident of Jacksonville, Florida had and received gross income in excess of $475,000; that by reason of such gross income he was required by law, following the close of the calendar year 1996, and on or before April 15, 1997, to make an income tax return to the District Director of the Internal Revenue Service (IRS) for the Internal Revenue District of North Florida, at Jacksonville, Florida, or to the Director, IRS Center, at Atlanta, Georgia, in the Northern District of Georgia, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well-knowing and believing all of the foregoing, he did willfully fail to make an income tax return to said District Director of the IRS, or to said Director of the IRS Center, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

2000 Dec 20 Fleming's Plea Agreement

FILED IN OPEN COURT
DEC 20 2002
CLERK, U. S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

[14]UNITED STATES OF AMERICA :
:
v. : CASE NO. 3:00-cr-262-cr-J-2OHTS
:
DONALD C. FLEMING :

PLEA AGREEMENT

A. **Particularized Terms**

Pursuant to Fed. R. Crim. P. 11(e), the United States of America, by Paul I. Perez, United States Attorney for the Middle District of Florida, [15]the defendant DONALD C. FLEMING mutually agree as follows:

1. Count Pleading To

The defendant shall enter a plea of guilty to Count One of the Indictment. Count One charges the defendant with conspiracy to defraud the United States Department of the Treasury for the purpose of impeding, impairing, defeating and otherwise obstructing the lawful functions of the Internal Revenue Service in violation of Title 18 U.S.C. § 371.

2. Maximum Penalties

Count One carries a maximum sentence of five

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[14] Style is reformatted.

[15] As such in the original. "[A]nd" reasonably presumed.

years imprisonment, a criminal fine of $250,000, or both, a term of supervised release of three years, and a special assessment of $50, said special assessment to be due on the date of

Defendant's Initials /s/ DF

CERTIFIED A TRUE COPY
SHERYL L. LOESCH, CLERK
U.S. DISTRICT COURT
By: /s/
Deputy Clerk

1060

sentencing. With respect to certain offenses, the Court shall order the defendant to make restitution to any victim of the offenses(s), and with respect to other offenses, the Court may order the defendant to make restitution to any victim of the offense(s), or to the community, as set forth below.

3. Elements of the Offense

The defendant acknowledges understanding the nature and elements of the offense with which the defendant has been charged and to which the defendant is pleading guilty. The elements of Count One are:

First: That the defendant and one or more other persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment;

Second: That the defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one overt act of the conspiracy as described in the indictment; and

Fourth: That an overt act was knowingly committed

in an effort to carry out or accomplish some object of the conspiracy.

4. Counts Dismissed

At the time of sentencing, the government will move to dismiss the remaining counts of the Indictment against the defendant in Case No. 3:00-cr-262-J-2OHTS, that being Counts Two through Ten, and Count Fifteen pursuant to Fed. R. Crim. P. 11(e)(1)(A).

Defendant's Initials /s/ DF

5. Chapter Two Offense Level

Pursuant to Fed. R. Crim. P. 11(e)(1)(B), the United States will recommend to the Court that the defendant's offense level (prior to consideration of acceptance of responsibility pursuant to USSG § 3E1.1) should be calculated at offense level of 17 pursuant to 2000 USSG §2T1.1(a) and that there should be no upward adjustments pursuant to USSG § 2T1.1(b). The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

6. Acceptance of Responsibility

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a three-level downward adjustment for acceptance of responsibility, pursuant to USSG §3E1.1. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court, the defendant will not be allowed to withdraw from the plea.

7. Use of Information - Section 1B1.8

Pursuant to USSG §1B1.8(a), the United States

agrees that no self-incriminating information which the defendant may provide during the course of the defendant's cooperation shall be used in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in USSG §1B1.8(b).

Defendant's Initials /s/ DF

[16]10. Taxes - Payment and Cooperation

The defendant agrees to undertake payment of all taxes, interest, and penalties found to be lawfully owed and due to the Internal Revenue Service with regard to both the defendant's personal income taxes and all taxes due and owing from the operation of the various businesses he controlled as more fully described in attached Factual Basis.[17] for, among others, the years 1993, 1994, 1995 and 1996, and to cooperate with and provide to the Internal Revenue Service any documentation necessary for a correct computation of all taxes due and owing for those years, including, if necessary, the filing of amended tax returns for said years, and further agrees that the Court may make this term a condition of any sentence of probation or supervised release. ~~This agreement extends to~~ /s/ AWM /s/ DF

B. **Standard Terms and Conditions**

1. Restitution Special Assessment and Fine

The defendant understands and agrees that the Court, in addition to or in lieu of any other penalty, shall order the defendant to make restitution to any victim of the offenses(s), pursuant to 18 U.S.C. § 3663A, for all offenses described in 18 U.S.C. § 3663A(c)(1) (limited to offenses committed on or after April 24, 1996); and the Court may order the defendant to make restitution to any

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[16] There is no 8 or 9.

[17] As such in the original.

victim of the offense(s), pursuant to 18 U.S.C. § 3663 (limited to offenses committed on or after November 1, 1987) or 18 U.S.C. § 3579, including restitution as to all counts charged, whether or not the defendant enter a plea of guilty to such counts, and whether or not such counts are

Defendant's Initials /s/ DF

dismissed pursuant to this Plea Agreement. On each count to which a plea of guilty is entered, the Court shall impose a special assessment, to be payable to the Clerk's Office, United States District Court, and due on date of sentencing. The defendant understands that this Plea Agreement imposes no limitation as to fine.

2. Supervised Release

The defendant understands that the offense to which the defendant is pleading provides for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character, and conduct of the defendant, to provide relevant factual information, including the totality of the defendant's criminal activities, if any, not limited to the count to which the defendant are[18] pleading, to respond to comments made by the defendant or the defendant's counsel, and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the

[18] As such in the original.

disposition of this case, subject to any limitations set forth herein, if any.

Pursuant to 18 U.S.C. § 3664(d)(3) and Fed. R. Crim. P. 32(b)(4)(A), the defendant agrees to complete and submit, upon execution of this Plea Agreement, an

affidavit reflecting the defendant's financial condition. The defendant further agrees, and by the execution of this Plea Agreement, authorizes the United States Attorney's Office to provide to, and obtain from, the United States Probation Office or any victim named in an order of restitution, or any other source, the financial affidavit, any of the defendant's federal, state, and local tax returns, bank records and any other financial information concerning the defendant, for the purpose of making recommendations to the Court and for collecting any assessments, fines, restitution, or forfeiture ordered by the Court.

4. Sentencing Guidelines and Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this Plea Agreement. The Court may accept or reject the Plea Agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence and the sentencing guidelines, if any, applicable to the defendant's case will be determined solely by the Court, with the assistance of the United States Probation Office. The defendant understands that the Court is required to consider any applicable sentencing guidelines but may depart from these guidelines under some circumstances. The defendant

acknowledge[19] that the defendant and the defendant's attorney[20] have discussed the sentencing guidelines and the defendant understands how the guidelines are applicable to the defendant's case.

Defendant's Initials /s/ DF

The defendant further understands and acknowledges that any discussions between the defendant or her[21] attorney[20] and the attorney or other agents for the government regarding the potential application of the sentencing guidelines to the defendant's case and any recommendations by the government are not binding on the United States Probation Office or the Court and that, should any recommendations be rejected, and regardless of the guidelines calculated by the Probation Office or the Court, the defendant will not be permitted to withdraw the defendant's plea pursuant to this Plea Agreement. The government expressly reserves the right to support and defend any decision that the Court may make regarding the defendant's sentence, whether or not such decision is consistent with the government's recommendations contained herein.

5. Appeal of Sentence; Waiver

The defendant understands and acknowledge[19] that the defendant's sentence will be determined and imposed in conformance with the Comprehensive Crime Control Act of 1984 and the federal sentencing guidelines. The defendant is also aware that a sentence imposed under the sentencing guidelines does not provide for parole. Knowing these facts, the defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum set forth for the

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[19] As such in the original.

[20] As such in the original.

[21] As such in the original.

offense and pursuant to the sentencing guidelines and expressly waives the right to appeal the defendant's sentence, directly or collaterally, on any ground except for (1) an upward departure by the sentencing judge; (2) a sentence above the statutory maximum; or (3) a sentence in violation of the law apart from the sentencing guidelines; provided,

Defendant's Initials /s/ DF

however, that if the government exercises its right to appeal the sentence imposed as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

6. Middle District of Florida Agreement

It is further understood that this Plea Agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal, state, or local prosecuting authorities, although this Office will bring the defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

7. Filing of Agreement

This Plea Agreement shall be presented to the Court, in open court or in camera in whole or in part, upon a showing of good cause, and filed in this cause, at the time of the defendant's entry of a plea of guilty pursuant hereto.

8. Voluntariness

The defendant acknowledges that the defendant is entering into this Plea Agreement and are[18] pleading guilty freely and voluntarily without reliance upon any discussions between the attorney for the government and the defendant and her[21] attorney and without promise of benefit of any kind (other than the agreements contained

herein), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges the defendant's understanding of the nature of the offense or offenses to which the defendant is pleading guilty and the elements thereof,

Defendant's Initials /s/ DF

including the penalties provided by law, and the defendant's complete satisfaction with the representation and advice received from the defendant's undersigned counsel (if any). The defendant also understands that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that the defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against the defendant, the right against compulsory self-incrimination, and the right to compulsory process for the attendance of witnesses to testify in the defendant's defense; but, by pleading guilty, the defendant waives or gives up those rights and there will be no trial. The defendant further understands that if the defendant pleads guilty, the Court may ask the defendant questions about the offense or offenses to which the defendant pleaded, and if the defendant answers those questions under oath, on the record, and in the presence of counsel (if any), the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement. The defendant also understands that the defendant will be adjudicated guilty of the offenses to which the defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

9. Factual Basis

The defendant is pleading guilty because the

defendant is in fact guilty. The defendant certifies that the defendant does hereby admit that the facts set forth in the attached "Factual Basis," which is incorporated herein by reference, are true, and were

Defendant's Initials /s/ DF

this case to go to trial, the United States would be able to prove those facts beyond a reasonable doubt.

10. Entire Agreement

This Plea Agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

11. Certification

The defendant and defendant's counsel[26] certify that this Plea Agreement has been read in its entirety by the defendant and that he fully understands its terms.

DATED this 20th day of December, 2002.

PAUL I. PEREZ
United States Attorney

/s/ DONALD C. FLEMING
Defendant

By: /s/ A. WM. MACKIE
Assistant United States Attorney

/s/ RONALD T. HENRY
Assistant United States Attorney
Acting Deputy Chief,
Jacksonville Division

Defendant's Initials /s/ DF

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 3-00-cr-262-J-2OHTS

DONALD C. FLEMING

PERSONALIZATION OF ELEMENTS

1. Did you, from on or about 1993 through 1999, come to a mutual understanding with other persons to defraud the United States Department of the Treasury by impeding, impairing, defeating and otherwise obstructing the lawful government functions of the Internal Revenue Service with regard to the proper ascertainment, computation, assessment or collection of your federal income taxes?

2. Did you, knowing the unlawful purpose of this plan, willfully join in it?

3. Did you knowingly commit an overt act of the conspiracy during the existence of the conspiracy by sending TraffiCenter funds to a bank account operated by the Christian Patriots Association in Clakamas, Oregon?

4. Did you knowingly commit an overt act of the conspiracy in an effort to carry out or accomplish some object of the conspiracy by employing the above-referenced bank account to impede the Internal Revenue Service from ascertaining and collecting your true and correct tax liability?

/s/ DF

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 3:00-cr-262-J-2OHTS

DONALD C. FLEMING

FACTUAL BASIS

From at least October of 1988 through 1999, in Jacksonville, Florida, the defendant DONALD C. FLEMING was the true owner and operator of a radio broadcast business that operated under different names at various times, including the Jacksonville Broadcast Network, the Jacksonville Radio Network, the First Coast TraffiCenter, the Jacksonville Traffic Center, the AAA Enterprises Trust and the Info Distribution Trust (herein collectively referred to as the "TraffiCenter"). During this time, the TraffiCenter was operated as either a sole proprietorship, partnership or under the form of a trust entity that he effectively managed.

Throughout this time period, the nature of the business of the TraffiCenter was to provide live broadcast services to numerous radio and television stations in the Jacksonville metropolitan area. The TraffiCenter received business income from the payment by a large number of business clients for its broadcast of radio advertising for these clients. Given that the TraffiCenter was never incorporated, the business income from the operation of the TraffiCenter was attributable to the defendant, whether

Defendant's Initials /s/ DF

personally or as the manager of either a partnership or trusts. The defendant did not report, or cause to be reported, any of this business income from 1993 through 1996 to the IRS, whether as business, trust or partnership income.

To operate this broadcast service, the defendant paid a number of persons to work in the TraffiCenter, including broadcast announcer personnel, sales staff and operations technicians. The defendant routinely paid the salary of these workers in cash without withholding any employment taxes. The defendant did not report, or cause to be reported, the payment of the salary of these workers to the Internal Revenue Service (IRS) and did not pay, nor cause to be paid, any employment taxes for these workers, including Federal Insurance Contribution Act (FICA) taxes and Federal Unemployment Tax Act (FUTA) taxes.

Beginning in 1986 and continuing through November of 1999, the defendant, at times working alone and at times in concert with others, undertook various actions to impede and obstruct the IRS from (i) ascertaining and determining the true amount of the TraffiCenter income and (ii) assessing, computing, and collecting any federal income taxes in connection with the TraffiCenter income. Some of the actions taken by the defendant to impede the IRS are described below:

(1) Despite having income, as defined by the Internal Revenue Code, sufficient to required[22] him to file Federal Personal Income Tax Returns for the years discussed in Count One of the Indictment, the defendant and his wife stopped filing Federal Personal Income Tax Returns after the 1982 tax year. Thereafter,

beginning in 1986, when the defendant was contacted by the Internal Revenue Service regarding the delinquent returns, the defendant made a conscious decision to ignore the attempts of the IRS to contact

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[22] As such in the original.

him about his delinquent tax returns.

(2) In or about March of 1993, the defendant opened and began utilizing a "warehouse bank" account, as described in Count One of the indictment, operated by the Christian Patriots Association in Clakamas, Oregon. TraffiCenter business receipts were routinely deposited into this "warehouse bank" account and then exchanged for cash. One of the defendant's purposes for utilizing this "warehouse bank" was to impede the IRS in the performance of its lawful duty to assess and collect the defendant's true and correct tax liability.

(3) In or about June of 1993, the defendant employed Crown Enterprises to open up several trust into which ~~the~~ he /s/ AWM /s/ DF purportedly ~~move~~ moved /s/ AWM /s/ DF his businesses and other assets. One of the defendant's purposes for utilizing these trusts was to impede the IRS in the performance of its lawful duty to assess and collect the defendant's true and correct tax liability.

(4) In or about July of 1994, the defendant with the aid of one or more trustees placed "common law liens" on several of the trusts that were created in June of 1993. These were not bona fide liens as there was no debt warranting the liens. Rather, the defendant utilized these liens to impede and impair the IRS in the

performance of its lawful duty to assess and collect the defendants true and correct tax liability.

(5) On or about November 17, 1995, the defendant caused Consolidated Systems, LLC to be formed in the country of Nevis, British West Indies. On or about June 1, 1996, Consolidated Systems, LLC, purportedly made a $1,000,000.00 loan to the defendant. This was

not a true fide loan as no funds were actually exchanged or debt incurred. Rather this loan provided a way for the defendant to send funds off-shore in the form of a loan payment. One of the reasons for the formation of Consolidated Systems, LLC and the purported loan was to impede the IRS in the performance of its lawful duty to ascertain, assess, compute and collect the defendant's true and correct tax liability.

From the period from 1993 through 1996, the defendant's actions as described above resulted in a tax loss to the government with regard to evaded FICA taxes, FUTA taxes, employee personal income taxes not withheld, and personal income tax not paid in the following amounts:

	1993	1994	1995
FUTA	$7,030.88	$6,320.40	$1,241.11
FICA	$30,994.10	$35,491.37	$16,281.15
Income Tax Not Withheld	$36,258.18	$58,351.79	$45,353.43

	1996	Totals
FUTA	$5,783.11	
FICA	$28,435.36	
Income Tax Not Withheld	$46,465.12	

Defendant's Initials /s/ DF

	1993	1994	1995
Personal Income Tax Evaded	$54,315.00	$60,760.00	$14,486.00
Total Tax Loss	$128,598.16	$160,923.56	$77,361.69

	1996	Totals
Personal Income Tax Evaded	$28,625.00	
Total Tax Loss	$109,308.59	$476,192.00

Consequently, the total tax loss to the government associated with the defendant's actions in impeding and obstructing the IRS for the 1993 through 1996 years, giving credit to the defendant for all standard tax adjustments, deductions, calculations and exemptions to which the defendant would have been entitled, is $476,192.

Defendant's Initials /s/ DF

Numerics **Numerics conjured for Fleming**

Donald C. Fleming:
SSN: 077-34-4838

	Calendar Year		
	1993	1994	1995
Income	$638,702	$685,693	$628,114
Expenses	($471,021)	($504,357)	($407,378)
Net Income	$167,681	$181,336	$220,736
Income tax	$51,249	$56,255	$71,286
Self-employment tax	$11,057	$12,370	$13,501
Total tax	$62,306	$68,625	$84,787
Forced Back-up Withholding[23]	($13,960)	($45,299)	($56,825)
Tax Liability (Form 1040)	$48,346	$23,326	$27,962
Employment taxes			
Form 941	$67,252	$91,332	$59,958
Form 940	$7,030	$5,960	$1,241
Total tax Due	**$122,628**	**$120,618**	**$89,161**

[23] The "Forced Backup Withholding" was imposed on customers of TraffiCenter, not customers of Fleming, or of Arnold, but customers of TraffiCenter.

	1996	**Total**
Income	$554,390	$2,506,899
Expenses	($444,783)	($1,827,539)
Net Income	$109,607	$679,360
Income tax	$27,897	$206,687
Self-employment tax	$10,710	$47,638
Total tax	$38,607	$254,325
Forced Back-up Withholding	($19,145)	($135,229)
Tax Liability (Form 1040)	$19,462	$119,096
Employment taxes		
Form 941	$70,627	$289,169
Form 940	$5,777	$20,008
Total tax Due	**$95,866**	**$428,273**

Numerics conjured for Arnold

Al Arnold:

	4/1/96 to 12/31/96	1/1/97 to 12/31/97	1/1/98 to 10/5/98
Income	$415,793	$547,194	$626,254
Expenses	($333,587)	($422,732)	($327,832)
Net Income	$82,206	$124,462	$298,422
Total tax	$28,955	$44,467	$108,703
Forced Back-up With-holding[24]	$14,359	$0	$0
Tax Liability (Form 1040)	$14,596	$44,467	$108,703
Employment taxes due			
2Q96 (941)	$22,408		
2Q96 (940)	$1,380		
3Q96 (941)	$17,585		
3Q96 (940)	$1,015		
4Q96 (941)	$6,929		
4Q96 (940)	$503		
Total tax Due	**$64,416**	**$44,467**	**$108,703**

[24] The "Forced Backup Withholding" was imposed on customers of TraffiCenter, not customers of Fleming, or of Arnold, but customers of TraffiCenter.

	Total
Income	$1,589,241
Expenses	($1,084,151)
Net Income	$505,090
Total tax	$182,125
Forced Back-up With-holding	($14,359)
Tax Liability (Form 1040)	$167,766
Employment taxes due	
2Q96 (941)	$22,408
2Q96 (940)	$1,380
3Q96 (941)	$17,585
3Q96 (940)	$1,015
4Q96 (941)	$6,929
4Q96 (940)	$503
Total tax Due	**$217,586**

(3)

Supreme Court, U.S.
FILED
APR 26 2005
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No. 04-1345

In the Supreme Court of the United States

WILLIAM ALLEN ARNOLD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of

the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005

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* The government waives any further response to the petition unless the Court requests otherwise.